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Received JUL 20 1914

Municipal Law Reporter

Hanover, Pennsylvania.

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Volume V

July, 1913, to July, 1914.

T. F. CHROSTWAITE, Publisher.

PRESS
ANTHONY PRINTING COMPANY
HANOVER, PA.

JUL 20 1914

7/20/14

Municipal Law Reporter

PENNSYLVANIA

July 1913.

VOLUME V.

July, 1914

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P. H. Soentgen vs. Rural Valley Borough.

Boroughs—State Highways in Boroughs—Liability for Accident—Act of May 31, 1911, P. L. 468.

Under the above act the duty to keep State Highways in repair is on the Borough and not the State Highway Department or the Commonwealth, likewise the liability for neglect to keep in repair.

C. P. Armstrong Co., No. 109, June Term, 1913.

O. S. Marshall for plaintiff; W. A. McAdoo, for defendant.

Opinion by Painter, J., May 25, 1913:

On the 16th day of March, 1913, P. H. Soentgen, the plaintiff above named, in the lawful pursuit of his business was driving along Main Street, in the Borough of Rural Valley, Armstrong County, Pa., in a covered wagon and while so driving along said Street in said Borough the front wheel of his wagon dropped into a chuck hole in said street within the drive-way and travelled part thereof breaking the axle of said wagon and otherwise damaging it and throwing the plaintiff and his load of bread, cakes, etc., out into the mud, thereby causing him damages to the amount of \$50.00.

The street was in a dangerous condition for public travel and had been in this condition for some time previous to the accident and the town council and Commissioner of Rural Valley Borough had been notified of the dangerous condition of the Street at least a couple of weeks before the accident. The plaintiff was not guilty of any negligence which contributed to the accident.

The Act of May 31, 1911, P. L. 468, Route 189, provides for a State Highway from Kittanning to Clearfield commencing in Kittanning and running by way of Rural Valley to a point on the dividing line between Armstrong and Indiana Counties.

It appears that the State Highway Department had surveyed Main Street in said Borough as a part of said Route 189 and had adopted a grade of said Street and fixed the width thereof. That Main Street is the only Street which passes through said

Borough of Rural Valley and that said Streets connect at both ends at the Borough line with public roads adopted by the State Highway Department as a part of said Route No. 189 of said Act of Assembly and it has been taken over by the State Highway Department and is being kept in repair by said department.

That the accident, from which this action arose, occurred since the said survey fixing the grade and width of said Street had been made by the Highway Department and that it occurred within the limits fixed by the Department for the width of said Street or Highway.

It is further agreed by the parties that this street is a part of an abandoned turnpike, but for the past 40 years has been used by the said Borough and the Township from which said Borough was formed.

The question before us for decision is whether or not it was the duty of the defendant Borough to keep said street in repair, and if the Court so finds, then it is agreed that a judgment shall be entered in favor of the plaintiff for the amount of his claim, to wit, the sum of \$50.00, but if the Court be of opinion that it was the duty of the State Highway Department to keep said Street in repair by reason of it being a part of the State Highway Route No. 189, then judgment to be entered for the defendant.

The Act of Assembly providing for the establishment of a State Highway Department and providing for the taking over of certain roads was approved on the 31st day of May, 1911.

So far as we have been able to learn from our examination of the law this Act as to the liability of the State Highway Department under circumstances such as presents itself in the case at bar has received no judicial construction and we have therefore no recourse, except to the Act itself.

We are met on the very threshold of our investigation with the statement in the title to the Act that it is an Act "providing for taking over from the Counties or Townships of the Commonwealth certain existing public roads," etc., and "relieving the several Townships from any further obligation and expense to improve or maintain the same and relieving said Townships

or Counties of authority over same; requiring Boroughs and incorporated Townships to maintain certain State Highways wholly and in part, providing aid by the State to Counties and Townships desiring the same in the improvement of Township and County roads." "Providing method of application for State aid in the improvement, maintenance and repair of Township or County roads."

It will appear from this title that the word Boroughs has been constantly omitted in the title to this Act. So that we feel constrained to believe that it was intentionally so done by the Legislature and that it was not the intention of the Legislature to take the Streets of any incorporated Borough over for the purpose embraced in the Act. We feel that this construction of the many provisions embraced in said Act to meet just such contingencies as are presented in this case, and ample provision is made by the Act for the purpose of connecting the different routes by provisions to assist Boroughs in the way of improving their Streets, so as to make a connected highway from one County seat to another.

Section Five of said Act specifies that "the highways designated in this Act as State Highways shall be taken over by the State Highway Department from the several Counties or Townships of the State. And when so taken over shall thereafter be constructed, improved and maintained by the State Highway Department at the expense of the Commonwealth."

In this Section the absence of the word Boroughs is very noticeable which bears out the title of the Act that the intention of the Legislature was not to include the Streets in an incorporated Borough or City.

Section Ten of said Act provides that the said Act "shall not be construed as including or in any manner interfering with the roads, Streets and Highways in any of the Cities, Boroughs or incorporated Towns of the Commonwealth." Although it does make provision under certain arrangements to be made by the State Highway Commissioner and Borough or Town Councils that the unimproved sections of such roads may be improved or reconstructed, leaving the matter to the discretion of the State Highway Commissioner for reconstruction and

maintenance by the State Highway Department and providing how such maintenance shall be done.

It is apparent from an examination of this Act that the Streets of Boroughs were not intended to be made a part of the general Highway system of the Commonwealth, nor was there any intention of relieving the several Boroughs, through which any Highway passed, from burden of maintaining the streets. Nowhere does it appear either in the title to the Act nor in the several Sections of the general plan of State Highways and this fact is emphasized, not only by the constant omission of the word Boroughs in the title to the Act and in the Act itself, but by the specific provision made for just such cases as the one at bar, to-wit, the aiding of Boroughs to improve their streets which form a part of the State Highway.

In this view of the matter we find that it was the duty of the defendant Borough to keep its streets in repair and that there was no duty incumbent upon the State Highway Department or the Commonwealth of Pennsylvania to this end.

We therefore order and direct that judgment be entered in favor of the Plaintiff, P. H. Soentgen, in the sum of \$50.00 with costs.

Which opinion, finding and decree the defendant Borough excepts and at its request bill of exceptions sealed.

John Murray, et al., vs. Shamokin, Chief Burgess and Council.

Boroughs—Annexation—Petition—Signatures.

The ordinance of annexation is invalid where there were not sufficient signers who were the actual freehold owners of the lots and outlots.

C. P. Northumberland Co., No. 340, In Equity.

W. H. M. Oram, W. W. Ryon and P. E. Brennan, for plaintiffs.

J. W. Gillespie, for defendants.

Per Curiam, March 7, 1913:

In this case, certain freeholders of several districts of Coal Township adjacent to the Borough of Shamokin and known

as West Shamokin, Fairview, Edgewood and Bellair, presented their petitions to the borough council of the said Borough of Shamokin, requesting that they might be annexed to and become a part of the said Borough.

The plaintiffs in this bill in equity are opposed to the said annexation and seek to have the ordinance declared invalid and pray the court to restrain and enjoin the Borough of Shamokin from annexing the territory set forth in said petitions.

After hearing, the Court, in an opinion filed, held the ordinance to be valid as to the District of Bellair but invalid as to the West Shamokin, Edgewood and Fairview districts.

Exceptions were filed by the defendants to the findings of the court and to its decree nisi filed, wherein it held that the petition of West Shamokin, Edgewood and Fairview did not have a majority of freehold owners of lots and outlots and that the ordinance passed by the Borough of Shamokin was therefore invalid as to said districts.

Counsel for the exceptants here are not insisting that the court erred in so far as its findings affect the district of Edgewood and Fairview. It cannot be seriously disputed that the number of signers to the petitions to these districts were insufficient as neither of them had anything near a majority of the freehold owners of lots and outlots contained in the respective districts, and the borough was therefore without jurisdiction or proper authority to annex said territory.

Judge Auten, who sat in the case and heard the testimony, held "that the number of freehold owners of lots and outlots in the section of land known as West Shamokin who did not sign the petition for the annexation is one hundred and ninety-six and that the number who did sign this petition is one hundred and sixty-seven." He further found, in answering the defendants' ninth request for findings of fact, "that the petition for the annexation of what is known as West Shamokin purports to contain the names of one hundred ninety-four freehold owners of lots and outlots in the said district; that from this number must be deducted the names of twenty who own no property in said district, three who signed the petition as executors but who took no estates under the respective wills, three who sign-

ed the petition twice, and one who denied attaching her signature thereto, thus leaving one hundred and sixty-seven legitimate signatures to this petition." He further held, as a matter of law, "that the signatures of husbands who own no property in the districts but whose wives, respectively, were owners of lots and outlots, should be excluded from the petition."

Upon a review of the record and testimony in the case, we are of the opinion that the court was fully justified in finding as a fact that the number of signers in said district was one hundred and sixty-seven and that the number of non-signers was one hundred and ninety-six; that there were three who signed as executors but who took no estate whatever under the respective wills, three who signed the petition twice and that there was one who denied attaching her signature thereto, so that our inquiry is here directed particularly as to whether or not the court erred in finding from the evidence, that there were twenty signers to the West Shamokin petition, who own no property in said district.

From a close examination of the testimony, it is very evident that no property is owned in the district by Robert Hager, Daniel H. Schlegel, Dominick Kuppolo, W. L. Snyder, Trustee, Peter Barr, or Mrs. E. S. Feaster and that these signatures are all improperly on the petition and should not be counted. The remaining fourteen signers in the West Coal district which were not counted by Judge Auten, affixed their own signatures to the petition representing themselves to be owners, while in truth and in fact the title to the property they purported to represent was in the names of their respective wives. Counsel for the exceptants now contend that the court erred in excluding from the petition the said fourteen husbands whose wives were the owners of their respective properties and in support thereof rely largely upon the case of McDonough vs. Gensemer, decided by Judge Shay in 1911, and reported in 7 Schuylkill Legal Record at page 241.

It will be observed that in the McDonough case Judge Shay, in his opinion, says, "in the cases of Joseph Evans, E. E. Uhler and Charles Heisler, it was alleged that the husbands signed their names, but that the wives of these men own the freehold.

This is correct, but two of them, Mrs. Uhler and Mrs. Heisler, came into court and authenticated the actions of their husbands, saying that they had directed them to sign the petition, but they signed their own names instead of those of their wives. We are, therefore, of the opinion that this should stand. Mrs. Evans was sick on the day of the hearing and could not appear and without her testimony authenticating the signature of her husband, we do not feel that we should permit his name to stand on the petition."

There is nothing in this record to indicate that the wives of the fourteen signers above referred to appeared at the hearing and authenticated the signatures of their respective husbands. Nor is there anything in the records to show that any of these husbands were authorized or directed to sign the petition for their wives, except the testimony of the said husbands. The testimony further discloses that at least six of the signatures on the petition affixed by husbands whose wives are the owners, are not valid signatures and should not be so regarded. We refer to the signatures of Frank Bowers, who had no authority, John H. Spotts, whose wife directed him to sign his own name, John M. Feese, who failed to consult his wife concerning the signing whatever, Benjamin Morgan, who says he would refuse to sign his wife's name to the petition, Phillip Yezlosh, who had no authority, and Michael Garonchowski, whose wife signed his name instead of her own.

We are quite clear that not any of the twelve signatures above referred to are such signatures of freeholders as is contemplated by the Act of Assembly and therefore should not be counted.

The remaining eight signers testified that they were authorized and directed by their wives to sign the said petition but signed their own names instead of that of their wives who are the real holders of the title to the respective properties represented.

These women were not called to authenticate or ratify the signatures of their husbands nor is there anything in the record to show that these men were authorized or directed to sign said petition for their wives, except the testimony of the said husbands themselves.

We are in grave doubt whether or not the doctrine laid down by Judge Shay in the McDonough case should be extended so far as to permit or justify the counting of signatures under such circumstances where the same have not been approved or authenticated by the wives of the signers. In the McDonough case, Judge Shay says, "Mrs. Evans was sick on the day of the hearing and could not appear and without her testimony authenticating the signature of her husband, we do not feel that we should permit his name to stand on the petition."

If the eight signatures here referred to were counted however, it would still leave the petition in question with less than a majority of freehold owners of lots and outlots in said district.

We agree with Judge Auten that there were one hundred and sixty-seven signers to the said petition exclusive of the names here under consideration. If we add the eight signatures above mentioned, it will aggregate but one hundred and seventy-five names, while as the case now stands and from our findings as above indicated, not less than one hundred and eighty-two names would give a clear majority. We are of the opinion, therefore, that the petition pertaining to the district of West Shamokin contains less than a majority of freehold owners of lots and outlots in said district as required by the Act of Assembly and that the borough council, therefore, in passing the ordinance of annexation, was without proper jurisdiction; that the defendant's exception should therefore be overruled.

Now, to wit, March 7, 1913, the exceptions to the findings of fact and conclusions of law and the decree of the court filed by Judge Auten in the above stated case are hereby overruled and dismissed, and it is ordered, adjudged and decreed that the said ordinance of annexation in so far as it relates to the district known as Bellair, shall be held and regarded to be a valid ordinance; that the said ordinance is hereby declared invalid in so far as it relates to the districts of Edgewood, Fairview, and West Shamokin; that the costs shall be paid by the parties as indicated by Judge Auten in said opinion filed.

The prothonotary is directed to enter this order as the final decree of the court and to notify the counsel for both plaintiffs and defendant of the entry of the same.

Block vs. City of Lancaster.

Transient merchants—Constitution of the U. S.—Act of May 2nd, 1899, P. L. 159.

The above act is not in violation of the interstate commerce section of the Constitution of the U. S., when applied without discrimination against citizens and products of other states, and when the goods are not sold in the original package.

No. 47, March Term, 1913, C. P. Lancaster Co.

C. E. Montgomery, for plaintiff.

Bernard J. Myers, City Solicitor, for defendant.

Opinion by Hassler, J., March 29, 1913:

The facts necessary for a proper determination of the question involved in this case have been agreed upon in a case stated, and are as follows:

Julius Block is a resident of Washington, D. C., and is the manufacturer of men's and women's clothing. Through an agent on January 9, 1911, he paid a license fee to the City of Lancaster, Pa., of \$100 to "conduct a retail business in men's and women's clothing at 57 N. Queen St.," Lancaster, Pa., from January 12 to February 12, 1911. This is known as a license for a transient retail business. It is agreed that if he is not liable for such license fee, judgment shall be entered in his favor, but that if we find he is liable, judgment shall be entered for the defendant.

The license fee is authorized by the Act of May 2, 1899, Sec. 1, page 159, which is as follows: "Hereafter any person, whether principal or agent, entering into a transient or retail business in any city, borough or township of this Commonwealth for the sale of any goods, wares or merchandise whatsoever . . . shall take out a license for the same from the proper authorities of said city, borough or township." It also provides that the amount of said license shall be fixed by ordinance, and shall not be less than \$25 nor more than \$200 a month, and that the license shall be renewed monthly. The City of Lancaster,

by ordinance of March 13, 1906, fixed the license fee at \$100 per month.

It is contended that this act violates the interstate commerce section of the Constitution of the United States, when it is applied to one engaged in a manufacturing business outside of the state, and is therefore void so far as the plaintiff in this case is concerned. The rule on this subject as stated in *Ficklen vs. Shelby County*, 145 U. S. 1, and in *Brennan vs. Titusville*, 153 U. S., 289, is that "no state can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on."

It is well settled however, that a state can enact valid legislation regulating and taxing sales of goods previously brought into them, but cannot discriminate against goods from other states.

It has been decided in *Woodruff vs. Parham*, 8 Wallace, 123, that a statute imposing a uniform tax on all sales made within the state, whether by a citizen of it or of another state of goods then within the limits of such state, whether such goods are the product of that state or of another, is valid, and not in violation of the rule as above stated, except as to sales in original packages. It has also been decided in the following cases, *Com. vs. Gardner*, 133 Pa., 284, *Com. vs. Harmel*, 166 Pa., 89, *Com. vs. Gunham*, 191 Pa., 73, *Warden's License*, 24 Sup., 75, that a statute imposing a license tax on peddlers of certain goods, without regard to their place of manufacture, which makes no distinction between residents or products of one state over those of another state, is not repugnant to the commerce clause of the Constitution of the United States, even when applied to peddlers of goods previously sent into the state by manufacturers or dealers in other states. The Supreme Court of the United States has, in numerous cases, similarly decided the same question.

In *Guy vs. Baltimore*, 100 U. S., 434, after reviewing numerous authorities it is said, "in view of these and other decisions of

this Court it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the product of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired."

In *Machine Company vs. Gage*, 100 U. S., 676-679, a statute of Tennessee, imposing a license-tax upon all peddlers of sewing machines, was sustained as not in violation of the Federal Constitution, because it applied "alike to sewing machines manufactured in the state and out of it." The Court said: "In all cases of this class, to which the one before us belongs, is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. Wherever there is, such discrimination is fatal. Other considerations may lead to the same result. In the case before us, the statute in question, as construed by the Supreme Court of the state, makes no such discrimination. It applies alike to sewing machines manufactured in the state and out of it. The exaction is not an unusual or unreasonable one. The state, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff vs. Parham*, *Hinsen vs. Lott*, *Ward vs. Maryland*, *William vs. Missouri*, *supra*."

In *Emert vs. Missouri*, 156 U. S., 296, a Missouri statute requiring the payment of a license-tax by peddlers was held to apply to the sale by peddlers in Missouri of sewing machines made in other states, and not to be a regulation of interstate commerce. The decision was placed upon the ground that the statute made no discrimination against the goods of other states compared with domestic goods.

The act, under which this license-tax is authorized, does not

make any distinction between the citizens and products of this state and those of any other state. It imposes a license tax on any one who conducts a transient retail business, no matter whether he sells the product of this or of any other state. There is no discrimination. It refers only to such goods as are within the state when the sales are made, and it does not appear in the facts agreed upon in the case stated, that the goods which the plaintiff was engaged in selling in this state were in original packages. It is, therefore, within the power of the state to impose a license-tax on such sales, and the act, authorizing it, is not in conflict with the right of the general government to regulate interstate commerce. In our opinion therefore, the plaintiff was liable for it.

Counsel for the plaintiff contends that in the cases of *South Bethlehem vs. Hackett*, 12 L. L. R., 196, *Danville Boro. vs. Leiberman*, 4 D. R., 475, *Com. vs. Wormser*, 7 D. R., 318, *Wormser vs. Allentown*, 8 D. R., 649, statutes imposing such taxes as this, have been held to be unconstitutional. All these cases hold that the Act of May 4, 1889, P. L. 86, and the Act of May 10, 1893, P. L. 35, violated the commerce clause of the Constitution of the United States, for the reason that they discriminated against the citizens of other states, because they imposed a tax only on any one who engaged in transient retail business in any city, borough or township, who was not engaged in permanent business in such city, borough or township. Such, however, is not the case in the act involved here, as this imposes a tax on every one who does such a business.

He also contends that *Brennan vs. Titusville*, 153 U. S., 289, shows that the plaintiff here is not liable for this license fee. That case decides that an agent of a manufacturer, residing in another state, cannot be taxed by a state law for taking orders in this state to be filled at the factory and shipped into this state. Numerous cases might be cited to this effect. Such agent does not sell goods within the state at the time the sale is made. The sale is consummated at the factory in another state, and the goods are in that state at the time of such sale and to impose a tax on that sale, or on the agent, which in effect would be a tax on the sale, would be in violation of the inter-

state commerce powers of the general government. In *Com. vs. Dunham*, 4 Sup., 74, affirmed in 191 Pa., 73, and in *Com. vs. Harmel*, 166 Pa., 89, the case of *Brennan vs. Titusville*, *supra*, is shown not to apply to tax imposed on one who sells such goods as are within the state at the time the sale is made. In the latter case Justice Williams says, "In the recent case of *Brennan vs. The City of Titusville*, the judgment of this court was reversed by the Supreme Court of the United States on the ground that the ordinance upon which the prosecution rested was not a police, but a trade regulation, but it was said in that case that 'by virtue of its jurisdiction over persons and property within its limits a state may provide for the security of the lives, limbs, health and comfort of persons, and the protection of property so situated,' subject to the qualification that a 'subject-matter which has been confided exclusively to Congress by the constitution is not within the police power of the state unless placed there by congressional action.'

"We submit with great respect that the control of no branch of retail trade 'has been confided exclusively to Congress by the constitution;' and that the interstate commerce clause was never intended to do more than keep the great channels of commerce open, and to guard against such obstructions as state custom houses, state inspections, state taxes and the like on goods passing from manufacturer or wholesaler in one state to retail dealer or consumer in another.

"It must be conceded that these clocks may be sent into this state in manufacturer's packages, and they may be sold in the same packages under the authority of the interstate commerce clause; but once in this state and the package opened by the consignee, the disposition of the separate articles at retail is intra-state traffic and subject to the police regulations that experience may show to be necessary for the protection of citizens in the comfort of their homes and the enjoyment of their property. To deny this power to the states and to assert that the wandering and unscrupulous adventurers who buy their brass jewelry or worthless clocks on one side of a state line may, as agents of interstate commerce, invade any other state to cheat, and defraud its citizens, is to degrade the whole

subject and to create needless friction between the general government and the people of the several states."

Being of the opinion that there is no violation of the interstate commerce clause of the Constitution of the United States by the acts authorizing the imposition of the license fee paid by the plaintiff in this case, we are of the opinion that he was liable to pay it, and therefore, enter judgment for the defendant.

Seibert vs. Sebring.

Nuisance—Obstruction in highway—Injunction.

Even with the permission of the borough a person has no right to erect on his neighbor's sidewalk a post or sign intended for his own particular use.

No. 2, Sept. T., 1911, C. P. Centre Co. In Equity.

John Blanchard, W. Harrison Walker and Edmund Blanchard, for plaintiff.

W. D. Zerby, S. G. Gettig and John J. Bower, for defendant.

Opinion by Hall, P. J., Feb. 12, 1913:

The plaintiff, James L. Seibert, is the owner in fee of a certain lot situated in the borough of Bellefonte, having a frontage of forty-two feet and a depth of two hundred feet. It is bounded on the east by Allegheny street, one of the principal streets of the borough, on the north by Burrows avenue and on the west by Locust avenue. Immediately in the rear of this lot across Locust avenue the defendant, John Sebring, Jr., occupies and uses an automobile garage on a lot owned by his father, which has a frontage of fifty feet on Spring street, and is bounded on the west by Spring street, on the north by Burrows alley and on the south by Locust alley. Allegheny street is macadamized. The driveway thereon being the width of about thirty-five feet, with concrete curbs on each side, several inches higher than the driveway and between these curbs and the sidewalk on each side, a distance of about ten feet there is a grass covered

strip of land in which shade trees are planted. This portion of Allegheny street is one of the principal residential parts of the borough, this portion of the town being given up entirely to residences, churches and schools. About May 1, 1911, the defendant, disregarding the objections of the plaintiff, during the night time and without the knowledge of the plaintiff, erected or caused to be erected in the grass grown strip between the curb and the sidewalk in front of plaintiff's lot at the intersection of Allegheny street and Locust alley an iron post embedded in a foundation of concrete, to the upper part of which post there is attached a rectangular iron sign about three feet in length and about fourteen inches in width, extending from the post toward the center of Allegheny street at right angles thereto, on both sides of which appear the words "Bellefonte Fire-Proof Garage," and also a hand with an index finger indicating the direction along Burrows alley to the rear of plaintiff's lot where the defendant's garage is situated. Permission for the erection of this sign was granted to the defendant at a meeting of the town council on May 1, 1911, but on Aug. 7, 1911, this permission was rescinded in resolution setting forth that it had been granted under the impression that the defendant had obtained permission of the abutting property owner and as it now appeared that this was a misapprehension and that Mr. Sebring had been notified by the abutting property owner not to place said sign in front of his property, the permission formerly given was rescinded and revoked. Subsequently the plaintiff requested the defendant to remove the sign but without avail. Still later the sign post was cut off a few inches from the ground in the night time by persons unknown and thereafter the defendant caused the sign post to be welded or joined together in its original position. After this was done and before the bringing of this suit, the plaintiff again requested the defendant to remove the sign and was informed by the defendant that he would not remove it or agree to its removal and that if it were again removed he would erect another, whereupon the plaintiff brought this bill praying for a perpetual writ of injunction restraining the defendant, his agents or employes, from maintaining or interfering with the removal of the sign, and commanding him

to remove the said sign post and its foundation and to fill in the hole left by such removal and to cover the same with sod.

The plaintiff's ownership of the lot fronting on Allegheny street and Locust alley vests in him the fee to the center of the street and alley subject only to the easement of the borough for legitimate municipal purposes. And the erection by the defendant of the sign complained of which conserves no purpose whatever except the advertisement of his own private business constitutes a continuing and permanent trespass on the land. The law upon this subject as first declared in Pennsylvania in the case of *Paul v. Carver*, 26 Pa. 223, need not be elaborated by the citation of the many later decisions following that case. In that case the syllabus is as follows:

"Where a public street or highway is called for as a boundary or monument in a deed it is used as an entirety to the center of it, and to that extent the fee passes. In such cases, it will require an express exception in the deed, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the grantee to the edge of the street. And although the measurement of the distance set forth in the conveyance, brings the line only to the side of the street, this is not sufficient to control the rule of law which carries the title to the center of it." This case has been cited and approved in twenty-eight subsequent decisions of our Supreme Court, the last one being the case of *Saccone v. West End Trust Co.*, 224 Pa. 554, and its doctrine may now be regarded as firmly settled in the laws of Pennsylvania.

While it is true that municipalities have broad powers relative to their public highways for all municipal purposes we know of no case where it has been held that they could give permission to use any part of the highway for a purely private purpose. All of the cases cited to us by the learned counsel for the defendant look toward the conservation of some public utility or some private necessity dependent thereon. In the case of *Benner v. Junker*, 190 Pa. 423, it was held that, "no property owner no matter what the necessities of his trade may be had a right to use the sidewalk in front of his neighbor's residence for business purposes. He not only has not

the right to use it continually, he had not the right to use it at all for such purposes. If he does so use it a court of equity will enjoin him." Municipalities have been allowed to fix by ordinance the use of the footway for cellar entrances, balconies, bay windows, the planting of shade trees along the highway, etc., but all of these powers must be by general regulations applying to all people alike. They have been held to have the power to grant a property owner the right to lay a water pipe in the street, to conduct the water from his residence to certain other houses which he owns, but this was because the ordinance was held to be within the purview of the powers of the municipal authorities to regulate the water supply of its citizens. No case however, maintains or even suggests the right of a municipality to grant to an individual a license to erect a permanent structure in front of the property of another on a public street for the sole purpose of advertising in private business. It has been argued by the counsel for the defendant that this sign conserves a public purpose by directing travelers driving into the borough to a place where they may find garage accommodations, but if this view were upheld the entire front of the plaintiff's lot might be screened from the view of the street by the erection of additional signs setting forth that the hotel was three blocks further on, the brewery in some other section of the city and the various dealers in drygoods and groceries might also advertise their respective locations. The temporary obstruction of a street on the ground of reasonable necessity such as unloading wood on the street for the purpose of having it carried into the house, or the storing of building materials in a convenient manner while a building is being erected, or a merchant having his goods placed in the street for the purpose of removing them to his store within reasonable time, have been held to be justified, but the merchant has no right to keep his goods on the street for the purpose of selling them, because there is no necessity for it. *Com. v. Passmore*, 1 S. & R. 217, and this case was decided notwithstanding an ordinance to the contrary. We have referred to the fact that all permission to use the public streets must be by the establishment of general regulations.

In *Com. v. Harris*, 15 Phila. 10, affirmed by the Supreme Court, July Term, 1881, No. 11, it was held that the powers invested in the council of the city of Philadelphia, by the act of April 16, 1838, P. L. 626, with regard to bay windows only authorized them to make and establish general rules for the regulation of such erection but did not confer upon them the right to grant by special ordinance permission to construct a bay window in any one particular house. In a similar case, *Reimer's Appeal*, 100 Pa. 182, it was said that where public rights are invaded there is no principle that prevents an injunction being granted. "In such case no question as to the amount of damages is raised but simply one of the invasion of right." In the case of the *Com. v. Kembel*, 30 Pa. Super. Ct. 199, referring to the appropriation for a private purpose of space in the highway, the court below said, that one who appropriates to himself space in the highway "creates a purpresture by making several to himself that which ought to be common to many."

It will be seen, therefore, that the grant of a license by the borough council in the present case for the erection of the said sign in front of the plaintiff's property was clearly *ultra vires* and void and as this has been recognized by the council and the license revoked the defendant has no standing by reason of it.

A purpresture may be defined as an appropriation by an individual of a part of that which belongs to and ought to be free and open to the enjoyment of the public at large. A nuisance may be either public or private. It is public when it affects the right to which every citizen is entitled. It is private where it is done to the hurt, annoyance, or detriment of the lands, tenements, or hereditaments of another, and not amounting to a trespass; any unwarrantable, unreasonable, or unlawful use by a person of his own property, to the injury of another constitutes a private nuisance. And so in our view of the present cases the sign in question may be regarded as a purpresture inasmuch as it is an appropriation by a private individual of space in the highway which should be common to the public. It is also a public nuisance for the reason that

it is an invasion of the rights to which every citizen is entitled and it is a private nuisance because it is an unlawful act which is done to the annoyance and detriment of the land of the plaintiff. Any person who is injured by a private nuisance may bring a proceeding for equitable relief in his own name and where a wrong is of a continuing character or productive of damages which cannot be estimated by ordinary standards, the damages may be said to be irreparable and an injunction will lie. *Pennsylvania Lead Co.'s Appeal*, 96 Pa. 116. It is contended upon the part of the defendant that this action rests solely upon the claims of trespass upon the property of the plaintiff and that as his title is not clear equity cannot intervene. In our view of the case the plaintiff's title to the center of the street is entirely clear, but even if it were not and he had no title at all yet as one who is especially injured by a nuisance occurring in the street in front of his property equity would still have jurisdiction. "A man is not to be driven from his home by an offensive obstruction, or compelled to sell it even for more than its value by one who is not invested with power to injure or take it for public purposes." *Penna. R. R. Co.'s Appeal*, 115 Pa. 514; *Garvey v. Harbison-Walker Refractories Co.* 213 Pa. 177. "If the right is clear and not doubtful, it need not first be established by a suit at law, nor is it necessary that the owner should prove special damage to entitle him to a decree." *Hack's Appeal*, 101 Pa. 245.

DECREE.

It is, therefore, ordered and decreed that a perpetual and mandatory writ of injunction be issued forever restraining the said defendant, John Sebring, Jr., his agents and employes, from maintaining, or interfering with the removal of the automobile garage sign post erected at or near the southwestern intersection of Allegheny street and Burrows alley, in the borough of Bellefonte, in the county of Centre, and state of Pennsylvania, and from erecting or maintaining any sign post at or near the intersection of said street and alley; and also enjoining, directing and commanding the said defendant, John

Sebring, Jr., within twenty days after service of the same to remove the said sign post and its said foundation, and also to dig out of the ground all concrete or other foundation matter used in establishing the said foundation, and to fill in the hole left by the removal of said foundation and concrete with proper earth for sustaining sod, and so soon as the weather shall permit to sod over said earth at the level of and so as to join the adjoining sodded strip of ground.

Commonwealth ex rel. vs. Richards et al.

Enrollment Act of July 25, 1913—Election Law.

The above act is constitutional and applies to primaries to be held September 16th, 1913. The purpose and effect of the act discussed.

No. 293, Sept. T., 1913, C. P. Clearfield Co.

Rule for mandamus.

W. A. Hagerty and W. I. Swoope, for writ.

A. M. Liveright, contra.

Opinion by Reed, P. J., August 6th, 1913:

This rule was obtained at the instance of John M. Hastings, election assessor in the 2nd ward of the Borough of Clearfield, to compel the respondents to have the election registry so prepared as to enable the relator to make the party enrollment required by the Act of Assembly approved July 25, 1913 (No. 472), relating to the registration and enrollment of voters according to their respective party preferences. The respondents in their answer filed set forth a number of reasons why the writ prayed for should not be allowed, and contend that the act upon which the application is based does not require a registration and enrollment of voters according to party preferences for the year 1913, and, furthermonre, that in any aspect it is an unconstitutional enactment. No objection is made to the form of the proceedings, and counsel representing the respective parties

have expressed the desire to have the two questions raised by the respondents, namely, the constitutionality of the act and its application to the primary election to be held Sept. 16, 1913, passed upon without regard to any technical objections which might be raised to the form of the proceedings.

Under previously existing laws, personal registration by the voters residing in cities of the first, second and third classes has been a condition precedent to their right to vote, when otherwise qualified. In election districts other than in cities of the first, second and third classes, the voters residing therein have been required to be registered, but if the name of any elector in such district was omitted from the registry list, he still had a right to vote upon making proof of his right thereto. These registration laws, however, did not require voters in any election district to be registered and enrolled according to party preferences. The Registration and Enrollment Act of July 25, 1913 (No. 472), is a departure from prior registration acts in two particulars. In the first place, it makes registration of voters in all the election districts of the State a condition precedent to their right to vote; and in the second place, if they desire to vote a party ticket, they must declare their respective party preference and have the same noted on the registry list at the time of their registration.

The Constitution, as amended in 1901, provides: "Every male citizen, twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections, subject, however, to such laws requiring and regulating the registration of voters as the general assembly may enact:

"1. He shall be a citizen of the United States at least one month.

"2. He shall have resided in the State one year (or if, having previously been a qualified elector or native-born citizen of the State, he shall have removed therefrom and returned, then six months) immediately preceding the election.

"3. He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.

"4. If twenty-one years of age or upwards, he shall have

paid within two years a State or county tax, which shall have been assessed at least two months and paid at least one month before the election."

It thus appears that the right of the legislature to enact laws requiring and regulating the registration of voters has constitutional authority for its exercise, and that when a voter is constitutionally qualified to vote, he may, nevertheless, by a legislative enactment, be deprived of the right to vote if not registered in compliance with such enactment. I am not persuaded that the act in question so palpably offends against the Constitution, in any of the particulars suggested by counsel for the respondent, to warrant declaring it unconstitutional. In my opinion, its enforcement will not impose any undue burden or inconvenience upon the voters, nor will its enforcement for this or any other year defeat the right of a voter, who is qualified under the Constitution, to vote or interfere with any of his other constitutional rights, nor will it destroy the equality of elections. All doubts are to be resolved in favor of its constitutionality, and, in any event, this is a question that should be raised when it will not involve or endanger the right of all the voters in the county to cast a party ballot.

Viewing this Registration and Enrollment Act in the light of prior registration acts and of the fundamental law authorizing the enactment of such legislation, there can be no doubt about the duty of the respondents to do whatever is necessary to secure the registration and enrollment of voters according to party preferences, as required and directed by it. The failure or neglect to do so would result in depriving every voter in the county of the right to cast a party ballot at the primary election to be held Sept. 16, 1913. It is expressly provided in the 3rd section of the act that the assessor shall, within forty-five days after its approval, make an enrollment of each voter residing within the district in which he is authorized to make an assessment and registration of voters, and in the 5th section, that the county commissioners shall have the registry lists so prepared as to permit the assessor to insert the party enrollment of each elector. Manifestly, these requirements of the act relate to the registration and enrollment of voters to be made for the

fall primary election for the year 1913. To hold otherwise the provisions requiring an enrollment (according to party preference, as required by the 1st section) within forty-five days after the approval of the act would have to be stricken from the act or disregarded, which would contravene the general rule for interpreting a statute, which requires, if possible, that effect shall be given to every word in it. If the legislature had not intended this act to apply to the primary election to be held this fall, it would have been an easy matter to say so. Certainly language plainly indicating otherwise would not have been used. The fact that there has been a registration of voters, either partially or wholly completed, in accordance with prior registration acts does not affect the right of the legislature to pass an act requiring additions to be made to such registration or require an entirely new registration and enrollment of the voters so registered. The registration and enrollment to be made within forty-five days after the approval of the act is clearly a special enrollment of the voters for this year. It is expressly provided that hereafter the assessor is required at the time of making the annual assessment, in addition to the duties now authorized and required by law, to make an enrollment of all the voters in his district and to ascertain, if possible, by personal inquiry of the elector, his party politics, preferences or affiliations, and to note and record the same, with his residence and other particulars required in making the assessment. If the voter is found to be absent when his residence is visited by the assessor at the time of making the annual assessment, a certificate of enrollment is to be left at his residence, which the elector may fill out and give to the assessor at some time prior to or on the sixty-second or sixty-third day preceding each primary, at which time the assessor is required to sit at the polling-place to receive and record such certificates. Since the elector must have resided in the election district where he offers to vote at least two months immediately preceding the election, his registration and enrollment as to party preferences hereafter should be made not later than the sixty-second day preceding the primary election. This will not conflict with the elector's constitutional qualifications. If he has resided in the district for at

least two calendar months immediately preceding the primary, he will be entitled to be registered and enrolled on said sixty-second day preceding the primary; otherwise, not. If he is entitled to registration and enrollment on the sixty-second day preceding the primary and fails or neglects to have such registration and enrollment made, the fault is his. For the year 1913, however, the legislature recognizes that the registration and enrollment of the voters according to party preferences cannot be made two calendar months before the primary election, and, therefore, provides for the year 1913 that it may be made at any time within forty-five days after the approval of the act, which leaves unaffected the constitutional requirements entitling the voter to vote. In section 9 it is provided that only those electors who have been duly registered and enrolled as members of some political party may vote the ballot of their respective party enrollment, and that electors not enrolled and registered as members of some political party shall not be permitted to vote at any primary election. Section 13 repeals all acts of assembly inconsistent or in conflict with the preceding sections of said act.

Inasmuch as the acts of assembly in this State, unless otherwise therein provided, go into force and effect upon their approval, this act became operative on the day of its approval by the Governor, and all other acts inconsistent or in conflict therewith were thereby nullified. The act creates an obligation affecting a substantial right, and is, therefore, a substantial law, and compliance with its mandates is a condition precedent to the exercise of such right. So far as the primary election to be held Sept. 16, 1913, is concerned, compliance with the provisions of the act is neither impossible nor unnecessarily burdensome or inconvenient, and there is no such conflict between any of the provisions of the act as to render any part of it nugatory. It follows that there is no legal excuse for refusing or failing to make the registration and enrollment of voters according to party preferences so that the voters of the county, if they so desire, may vote for the various candidates for the local offices. Without such registration and enrollment their right of franchise will be limited to voting the non-partisan

ballot, which will contain only a list of the names of the candidates for the office of judge who may be voted for at said primary, and any elector not registered and enrolled as required by the act under consideration, who wilfully votes or attempts to vote at said primary election a party ticket, or any election officer who wilfully receives or conspires to receive the vote of any elector casting a party ballot, would severally be subject to a fine of \$1000 and one year's imprisonment, in the discretion of the court.

I have made as careful analysis of this act as the few hours given for its consideration would permit, and from this analysis I am persuaded that compliance with its provisions this year is imperative, and that the writ prayed for must go out in order that the electors of the county may fully exercise their right of franchise at the primary election to be held Sept. 16, 1913.

And now, Aug. 6, 1913, rule made absolute and writ of peremptory mandamus directed to issue as prayed for.

Commonwealth ex rel. vs. George Callahan.

Borough Council—Vacancies—Quo Warranto.

Council cannot fill a vacancy by reason of legal disqualification for a full term. Rules for forfeiture of office for non-attendance must be reasonable and cannot be retrospective.

No. 761, May Term, 1912. C. P. Lackawanna Co.

A. A. Vosburg, J. R. Edwards and A. S. Prokopovitch, for plaintiff.

O'Brien & Kelly, Warren, Knapp & O'Malley, and M. J. Martin, for defendant.

Opinion by Newcomb, J., January 6, 1913:

Issue was joined on defendant's answer to a writ sued out to test defendant's title to the office of borough councilman. The proceeding is had at the instance of the Commonwealth, and not that of a rival claimant. By agreement the cause was

submitted for decision by the Court without a jury sec. leg., upon the evidence taken in a former proceeding of the same kind at the relation of James L. Barr against the same defendant to No. 419 January T. 112. Hence the facts stated are mere repetition of what appears in that case where suit failed for defect in claimant's title.

These facts are believed to warrant the following

CONCLUSIONS OF LAW.

1. Down to the date of his alleged removal by action of council Mr. Barr was a de facto member of the body; and as between him and the council, for the purpose of testing the validity of that action, he should be regarded as a member de jure.

2. Whether council has power to vacate the seat of a member for non-attendance need only be assumed without undertaking to decide it. For present purposes it is enough to say that, being so assumed, it could be validly exercised only in conformity with due and reasonable regulations on the subject. The only regulation in this instance is that defined by rule adopted October 5, 1911, as stated in the 8th Conclusion of Fact.

3. On its face that is arbitrary and unreasonable. But though free from objection on that score, it could only operate prospectively. It could have no retro-active effect. Between that date and December 2, 1911, there had been only one regular meeting. It follows that the then incumbent could not have incurred the forfeiture on the date when his seat was declared vacant and filled by appointment of defendant.

4. Hence the attempt to vacate the seat on that basis was at best irregular and of no effect. The appointment of his successor was therefore abortive.

5. The averment of Barr's omission to account for his election expenses is immaterial to the present issue for the reasons: (1) the council is not the judge of his qualification in that particular; (2) it did not put his expulsion on that ground; (3) he is not a party to or otherwise interested in the issue.

6. Respondent's title is subject to impeachment at suit of

the Commonwealth; and defendant having shown no right to the office other than such irregular appointment, he must be deemed to be an intruder.

7. Judgment of ouster is accordingly directed to be entered against him and in favor of the Commonwealth, with costs, at the end of thirty days after notice, unless exceptions be filed in the meantime, sec. leg.

DISCUSSION.

This council's power to fill vacancies is derived from the Act of 22 May, 1895, P. L. 109. On its face that applies to existing vacancies occasioned by "death, resignation, removal from the borough, or otherwise," without purporting to confer authority to create a vacancy. There is no statutory power of that description. Yet there is no lack of power in the body to make all such rules as are reasonably necessary to the due performance of its functions. Hence, one can think of no good reason why a self-imposed rule for the vacation of a member's seat for continued absence without cause, would not be valid exercise of its corporate powers. Had it been so provided here, the only question would seem to be whether on its facts a case was presented to the council which constituted a breach of the rule. But a rule which prescribes the penalty of forfeiture of a franchise for non-attendance, regardless of sickness, disability or other unavoidable cause, is very arbitrary and unreasonable. That is the objection to which this rule is open. But waiving that, it could in no event support the action taken. It was essentially penal in character, involving as above noted a forfeiture. Needless to say it could not be made to operate retrospectively. No legislative body in the country can lay claim to any such power. While there had been a similar rule prior to that adopted October 5th, which might otherwise have been available, the effect of the new rule of that date was to supersede the operation of the earlier one. The impression is irresistible that in their eagerness to remove the incumbent for partisan reasons, the dominant faction over-reached themselves. Evidently the new rule was by them adopted at a late hour that

evening after Barr and another member had left the council room under the well founded belief that no meeting was to be held. So, on the merits it could not be said he was absent on that occasion even if that date could be considered. But December 2 was not itself a regularly monthly meeting. The regular meeting for that month fell on the 7th. Hence, to make up the three regular meetings they had to include not only October 5 and November 2, but also September 7th. Furthermore, just how it could be acted upon at the "adjourned regular" meeting of December 2, is not apparent. In the absence of anything to show the contrary, the presumption is that the proceedings of such meeting are confined to the unfinished business of its predecessor. Regardless of that, the action was fundamentally unsound both on the law and the facts. There was no legal vacancy to be filled by council. Hence defendant took nothing by appointment which he can assert against the Commonwealth.

He further sets up the failure of Barr's personal suit, and the ground thereof, to wit, that he was not legally qualified for want of filing his expense account. True, it was so decided on the theory that he must recover on the strength of his own title as it was at the inception of his suit. But that can avail defendant nothing at this time. In the first place no rival claim is now asserted. The Commonwealth is only exercising its prerogative to challenge his right, and to call upon him to show by what title he holds, the validity of which is the only matter in issue. In the second place, defendant merely invokes a dilemma either horn of which is fatal to his claim. Giving full weight to his contention that Barr was never qualified, it follows that the vacancy, if any, was for the full term, which cannot be filled by council: *Clarion Bor.* 189 Pa. 79. Such cases are not within the Act of 1895. They were already provided for by the organic law. By section 19 of the Act of 1851 it is provided that borough councilmen shall serve until their successors are duly elected and qualified. Accordingly where defendant, being a candidate for re-election, ran a tie with his competitor it was held that his tenure continued until such successor should be elected: *Com. ex rel, etc. v. O'Neal*,

203 Pa., 132. So defendant's case can derive no aid nor comfort from the theory that Barr was at no time a lawful incumbent.

The issue is with the Commonwealth and judgment nisi will be entered as above directed.

Hallett vs. Borough of Bellevue.

Boroughs—Ordinances—Publication—Change of grade.

Boroughs without authority cannot change the grade of a street by a mere contract with a private owner; the act is legislative and must be done by ordinance, with all the formalities of publication, etc.

No. 407 November Term, 1911. C. P. Allegheny Co.

Geo. H. Quail and J. M. Shields, for plaintiff.

D. L. Starr and W. S. Dalzell, for defendant.

Opinion by Brown, J., April 25, 1913: (Findings omitted.)

That plaintiff has failed to establish a legal right to the specific performance prayed for is obvious, for several reasons:

1. A borough is without authority to change the grade of a street by a mere contract with a private owner of property.

2. A change of grade of a public street is a legislative act of the local borough legislature—an act to be expressed by ordinance duly passed and published in the manner provided by law. The ordinance must clearly set out the grade, so that the public may be informed thereby. It must be self-sustaining, self-explanatory. This requisite cannot be supplied by evidence (i. e., plan) dehors the ordinance.

3. The resolution of September 11, 1906 and its accompanying form of proposed contract were not published; nor was the contract executed on behalf of the borough as required by the resolution. Publication was a legislative element essential to their validity, because they related to change of grades. As to the resolution and contract the publication should have read, in substance:

"A Resolution—Authorizing the proper officers for and on behalf of the Borough of Bellevue, to enter into a contract (with Ebenezer Hallett for the purpose of fixing the grades,

and grading, of—naming the streets—and providing for the payment of damages resulting therefrom), in the form following: (setting out in full the resolution and the proposed agreement)."

4. Section 3 of the Act of April 3, 1851, P. L. 323—relating to boroughs—(Purdon's Digest, 13th Ed., p. 508) declares:

"It shall be the duty of the corporate officers . . . :

"IV. To publish in at least one newspaper . . . and by not less than twelve advertisements, to be put up in the most public places in the borough, every enactment, regulation, ordinance or other general law at least ten days before the same shall take effect. . . .

Section 3 of the Act of May 23, 1893, P. L. 113 (Purdon's Digest 13th Ed., p. 512), directs:

"Every ordinance and resolution which shall be passed by . . . Council shall be presented to the chief burgess . . . and if he approve, he shall sign it . . ."

"That before any ordinance shall come into force and effect . . . , the same shall be recorded in the borough ordinance book, with the certificate of the secretary, and be advertised as heretofore required by law."

"The expression 'as heretofore required by law' has reference to the Act of April 3, 1851," as above quoted.

5. The pre-requisites to a valid, self-sustaining, self-explanatory ordinance (setting out clearly upon its face the grades, so that the public may be informed thereby), resolution and contract binding the borough, being absent, we are powerless to specifically enforce the contract—for we cannot supply the statutory requirements essential to a valid ordinance, a valid resolution, and a binding grade agreement between the parties.

6. There is no distinction between "ordinance" and "resolution," as applied to acts of Council affecting street grades. As said in *Kepner vs. Commonwealth*, 40 Pa., 124:

"Ordinance is the . . . most general term, including all forms of regulation by civil authority, even acts of parliament. With us its meaning is usually confined to corporation regulations. Ordinances are all sorts of rules and by-laws of municipal corporations. Ordinary usage shows this . . .

"Resolution is only a less solemn or less usual form of an ordinance. It is an ordinance still, if it is anything intended to regulate any of the affairs of the corporation. If the word 'ordinances' in the Act of Assembly, does not include such resolutions, the law that requires ordinances to be submitted to the mayor for his approval, is of no force at all, because it allows its substantial purpose to be defeated, by giving to ordinances the form of resolutions."

In *Jones vs. Schuylkill Light, Heat, and Power Co.*, 202 Pa., 164, it is said:

"The single question raised by this appeal is whether a resolution of a borough council accepting the bid of an electric light company to light the streets for five years, and directing the proper officials to execute a contract with the company, must be submitted to the chief burgess for his approval. The 3d section of the Act of May 23, 1893, provided that: 'Every ordinance and resolution which shall be passed by council shall be presented to the chief burgess of such borough. If he approves he shall sign it, and if he shall not approve it he shall return it with his objections to said council at the next regular meeting thereof, when said objections shall be entered at large in the record book, and said council shall proceed to a reconsideration of such ordinance or resolution.' The construction placed on this section of the act and on sections providing for advertisement, is that they apply to all acts of the council by ordinance or resolution which are of a legislative character.

"The Act of 1893 makes the chief burgess a part of the law-making power of a borough. Its plain meaning is that every ordinance and resolution. . . . This is the only safe rule, and following it we must hold that the resolution of April 15, 1901, accepting the bid of the Schuylkill Light, Heat and Power Company, and directing a contract to be made, is invalid."

To the same effect is *Elliott vs. Monongahela City*, 229 Pa., 618.

In *Carpenter vs. Yeadon Borough*, 208 Pa., 396, is it said:

"The authority of a municipal body to legislate or to contract is conferred by the law-making power of the state, hence it must be exercised in the manner provided in the statute confer-

ring it. A municipal corporation is simply the agent or instrumentality of the state to administer local government and to exercise certain powers and to perform certain duties within defined territorial limits in conformity with the method and to the extent delegated in the legislation creating and applicable to the corporation. . . .

"The 3rd section of the Act of April 3, 1851, P. L. 320 . . . , provides that 'it shall be the duty of the corporate officers, a majority of whom shall be a quorum; . . . IV. To publish in at least one newspaper . . . , and by not less than twelve advertisements, to be put up in the most public places in the borough, every enactment, regulation, ordinance or other general law, at least ten days before the same shall take effect.' This is mandatory and until the provision of the statute has been complied with, an ordinance is not effective and is as wholly inoperative as if the municipal legislative body had not acted in the matter: 1 Dillon on Munic. Corp., sec. 331; *Marshall vs. Commonwealth*, 59 Pa., 455; *Waln vs. Philadelphia*, 99 Pa., 330; *Clark vs. City of Janesville*, 10 Wis., 119. Publication is a duty imposed upon the corporate officers, and until it is performed no rights are granted, and the observance of no duties is enjoined, by the ordinance which can be enforced by or against the municipality. Before the statute has been complied with in this respect, the ordinance remains in the hands of the officers of the corporation awaiting the performance of an act by them essential to give it validity as a law of the borough."

The ruling in that case was followed in *Jaxtheimer vs. Sharpsville Borough*, 238 Pa., 42.

7. It would seem but equitable that plaintiff and defendant should share equally the costs of this proceeding.

In accordance with the foregoing opinion (Findings of Fact and Conclusions of Law) we suggest the following form of decree:

And now, April 25, 1913, this cause came on to be heard, and was argued by counsel; and upon consideration thereof, it is ordered, adjudged and decreed:

1. That plaintiff's bill be dismissed.
2. That each party pay one-half the costs.

The Public Service Company Law.

No. 854. Approved July 26, 1913.

Note:—This act contains sixty-three pages. While not greatly changing existing laws in any substantial manner, yet certain duties, requirements and methods of procedure are of such importance to most municipal corporations that we deem it advisable to print certain sections. We suggest the reading of the whole act by officers and attorneys interested.

Definitions. The term "Public Service Company," when used in this act, includes all railroad corporations, canal corporations, street railway corporations, stage line corporations, express corporations, baggage transfer corporations, pipe line corporations, ferry corporations, common carriers, Pullman car corporations, dining car corporations, tunnel corporations, turnpike corporations, bridge corporations, wharf corporations, incline plane corporations, grain elevator corporations, telegraph corporations, telephone corporations, natural gas corporations, artificial gas corporations, electric corporations, water corporations, water-power corporations, heat corporations, refrigerating corporations, sewage corporations, doing business within this State, and also all persons engaged for profit in the same kind of business within this Commonwealth: Provided, however, Such persons and corporations shall not be subject to the provisions of this act, with respect to any business transacted or any property owned by them outside of the Commonwealth of Pennsylvania; nor shall the provisions of this act be so construed as to extend to any matter or thing which, under the Federal Constitution, the Congress of the United States has the exclusive power to regulate, or which the Congress has, under said Constitution, in the exercise of its concurrent power, in fact regulated, to the exclusion of the concurrent power of the several States: And provided further, That none of the provisions of this act shall apply to the generation, transmission, or distribution of electricity; to the manufacture or distribution of gas; to the furnishing or distribution of water; or to the

production, delivery or furnishing of steam, or any other substance for heat or power, by a producer, who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for sale to others.

The term "Municipal Corporation," as used in this act shall include all cities, boroughs, towns, townships, or counties, created or organized under any general or special law of this Commonwealth.

Service. Art. II. Sec. 1. It shall be the duty of every public service company—

(a). To furnish and maintain such service, including facilities as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the commission.

Rates. (b). To render and furnish all such service at prices, charges, rates, tolls, fares, or compensation that shall be just and reasonable, and in conformity with such reasonable regulations or orders as may be made by the commission.

Improvements. (c). To make all such repairs, changes, alterations, and improvements in or to such service, including facilities, as shall be reasonably necessary for the accommodation or safety of its patrons, employees, and the public.

Contracts. (g). To file with the commission, when required by it, verified copies of any and all contracts, writings, agreements, leases, arrangements, or other engagements entered into by such public service company with any person, corporation, municipal corporation, any State Government, the Federal Government, or any branch or subdivision thereof, or other public service company, in relation to its public service.

Records. (i). To adopt, use and keep, in conducting its business, such form, method, system, or systems, of accounts, records, and memoranda as shall be prescribed by the commission; to carry no charges in any operating account which should properly be charged to the capital account, or vice versa; to carry a proper and reasonable depreciation account, if re-

quired so to do by order of the commission; and to obey and abide by all the regulations and orders of the commission concerning such accounts, records, and memoranda, and the keeping of the same: Provided, That this subsection shall also apply to all municipal corporations, with respect to the accounts, records, and memoranda relating to the rendering or furnishing by them to the public of any service of the kind or character rendered or furnished by public service companies, and to the making of reports in relation thereto.

Grade Crossings. (t). To obey and abide by all lawful orders and regulations of the commission, made under the provisions of this act, regulating the manner in which the tracks or other facilities of any railroad corporation, street railway corporation, or any other public service company, may be constructed across the tracks or other facilities of any other railroad corporation, street railway corporation, or any other public service company, at grade, or above or below grade, or at any prescribed level; or in which the tracks or other facilities of any railroad corporation or street railway corporation may be constructed across any public highway at grade, or above or below grade; or in which any public highway may be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade; or regulating the manner in which such crossings shall be operated, maintained, and protected, including the stationing of watchmen thereat, installation and regulation of lights, blocks, or other system of signalling, safety appliances, devices, or such other means or instrumentalities as the commission may prescribe; as well as to obey and abide by all lawful orders and regulations of the commission, made under the provisions of this act, requiring the alteration, relocation, removal, or abolition of any such crossings,—to the end, intent, and purpose that accidents may be prevented; and also to bear and pay the expenses, damages, or compensation incident thereto, either severally or in such proportions as the commission may determine under the provisions of this act.

Meters. (w). If a gas corporation, water corporation, or other public service company, furnishing its service or product

upon meter or other similar measurement, or electric corporation, to provide, and keep in and upon its premises, suitable and proper apparatus, to be approved from time to time and stamped or marked by the commission, for testing and proving the accuracy of gas, water, electric, or other meters furnished by it for use; and by which apparatus every meter may be tested, upon the written request of the consumer to whom the same shall be furnished, and in his presence if he shall so desire. If the meter so tested shall be found to be accurate, within such commercially reasonable limits as the commission may, by general or special order, fix for such meters, or class of meters, a reasonable fee, to be fixed by the commission by standing order, sufficient to cover the cost of such test, shall be paid by the consumer requiring such test; but, if not so found, then the cost thereof shall be borne by the public service company furnishing said meter.

Accidents. (x). To give immediate notice to said commission of the happening of any accident in or about, or in connection with the operation of its property, facilities, or service, wherein any person shall have been killed or injured; and to furnish such full and detailed report of such accident, within such time and in such manner as the commission shall, by general rule or special order, or otherwise, require. Such report shall not be open for public inspection, except by order of the commission, and shall not be admitted in evidence for any purpose in any suit or action for damages growing out of any matter or thing mentioned in said report.

Municipal Service. Art. III. Sec. 3. Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful:—

(d). For any municipal corporation to acquire, construct, or begin to operate, any plant, equipment or other facilities for the rendering or furnishing to the public of any service of the kind or character already being rendered or furnished by any public service company within the municipality.

Provided, however, That nothing herein contained shall

interfere with or affect the right or power of a municipal corporation to continue the operation of its municipal plant, or to extend the same, within the territory of such municipal corporation, or any part thereof, which is not then being supplied by a public service company rendering or furnishing service of a like kind or character: And provided further, That any municipal corporation which, at the time this act becomes effective, has, by authority of law, in process of construction any such plant for the rendering or furnishing to the public of any such service, may proceed with and complete the said construction, and begin to operate the same, without the aforesaid approval of the commission first had and obtained.

Crossings. Sec. 5. Upon the approval of the commission, evidenced by its Certificate of Public Convenience first had and obtained, and not otherwise, it shall be lawful for any railroad corporation or street railway corporation to construct its tracks or other facilities across the tracks or other facilities of any other railroad corporation or street railway corporation, or across any public highway, at grade, or above or below grade; or for any public highway to be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade; or for any public service company to construct any of its facilities across the facilities of any other public service company at the same or different levels. And it shall be lawful, upon like approval first had and obtained, and not otherwise, for any public service company to alter, relocate, remove, or abolish any such crossing: Provided, however, That in all cases in which the tracks or other facilities of a railroad corporation or street railway corporation cross the tracks or other facilities of another railroad corporation or street railway corporation or a public highway at grade, and such crossing is at the time this act becomes effective in process of abolition, under and in accordance with an agreement or contract entered into with any municipality providing for such abolition, it shall be lawful to proceed with the consummation of such abolition as provided in such agreement or contract, without the aforesaid approval of the commission first being obtained.

Contracts with Municipal Corporations. Sec. 11. No contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the commission: Provided, That, upon notice to the local authorities concerned, any public service company may apply to the commission, before the consent of the local authorities has been obtained, for a declaration by the commission of the terms and conditions upon which it will grant its approval of such contract or agreement, if at all.

(Note.—This section went into effect on approval, the remainder of the act goes into effect Jan. 1, 1914.)

Power over rates. Article V. Sec. 1. The commission shall have general administrative power and authority, as provided in this act, to supervise and regulate all public service companies doing business within this Commonwealth.

Said power and authority shall include the power to inquire into and regulate the service, rates, fares, tolls, or charges of any and all public service companies, including individual and joint rates; . . . the quantity and quality of water, gas, electricity, or light, heat or power, supplied.

Valuations. Sec. 20. (a). The commission shall have power, upon application or upon its own motion, to ascertain and determine the fair value of the property of every public service company in this Commonwealth, and to determine any matter in connection therewith; and shall exercise the said power whenever the same is required, or whenever it shall deem such valuation or determination necessary or proper under any of the provisions of this act.

In ascertaining and determining such fair value, the commission may determine every fact, matter, or thing which, in its judgment, does or may have any bearing on such value; and may take into consideration, among other things, the original cost of construction, particularly with reference to the amount expended in the existing and useful permanent improvements; with such consideration for the amount in market value of its bonds and stocks, the probable earning capacity of the property under particular rates prescribed by statute or ordi-

nance, or other municipal contract, or fixed or proposed by the commission, and for the items of expenditures for obsolete equipment and construction, as the circumstances and the historical development of the enterprise may warrant; the reproduction costs of the property, based upon the fair average price of materials, property, and labor; and the developmental and going concern value of such public service company; and these, and any other elements of value, shall be given such weight by the commission as may be just and right in each case.

(b). The commission shall also have power to make revaluations of the property of any public service company, from time to time, and to ascertain and determine the value of new construction, extensions, and additions to the same.

(c). The commission shall have power to establish reasonable general or special rules with respect to the preparation of such valuations, the forms to be followed, the inventories and statements and proofs of original cost to be made, and all other matters, figures, data, and information in connection therewith.

Motor Vehicles.

No. 385. Approved July 7, 1913.

Note.--This act contains fifteen pages. It modifies former acts without great changes. The first part of Section 14 (substantially the same as Act of 1909, P. L. 265), if the opinion of Judge Newcomb, Vol. 3, M. L. R. p. 217, is good law, is void for uncertainty. And by the opinion of Judge Doty, Vol. 3, M. L. R. p. 30, a burgess has no jurisdiction under the Act of 1909 which the present act follows. It is common practice, however, for burgesses to assume jurisdiction, if not under this act, then under other acts or ordinances against disorderly conduct, noises, etc.

We print the portions of the Act most important to borough officials.

Licenses revoked or suspended. Sec. II. The Highway Commissioner may, at his discretion, revoke or suspend, upon hearing, after due notice in writing, mailed to his address as stated in his application, of the proposed revocation and the grounds therefor, for any period up to one year, the registration of any car or the license of any driver, upon reasonable grounds, for improper conduct in operating a motor vehicle. No person to whom the registration of a motor vehicle has been refused, or revoked, shall drive or operate a motor vehicle upon the public highways of this State. No person shall knowingly permit any motor vehicle which he may own to be driven by any other person whose license has been revoked, or by any person to whom registration for a motor vehicle has been refused or whose registration of a motor vehicle has been revoked.

The State Highway Commissioner shall issue printed monthly bulletins, giving name and address of each applicant for license, together with the number of license issued to said applicant; and shall furnish same, free of charge, to mayors, burgesses, police magistrates, chiefs of police, aldermen, and justices of the peace, and shall furnish at a nominal fee said bulletin to all other applicants for the same.

Sec. 12. The provisions of the foregoing sections, relative to license and registration and the display of number tags, shall not apply to a motor vehicle owned by a non-resident of this State, other than a foreign corporation doing business in the State: Provided, That the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory, or federal district of his residence, relative to registration of motor vehicles and the display of number tags thereon, and shall conspicuously display the registration numbers as required thereby. The provisions of this section, however, shall be operative as to a motor vehicle owned by a non-resident of this State, only to the extent that under the laws of the foreign country, state, territory, or federal district of his residence, like exemption and privileges are granted to motor vehicles duly registered under the laws of, and owned by residents of, this State. No person who is mentally or physically incapacitated shall be permitted to operate a motor vehicle on the

public highways of this State, and if any such person shall have obtained a license it shall be void.

Warnings—Lights. Sec. 13. Every motor vehicle shall be provided when in use with good and sufficient brakes, and with a horn, bell, or other signal device. Motor vehicles shall, from one hour after sunset until one hour before sunrise, show at least two white lights, visible not less than two hundred (200) feet in the direction in which the motor vehicle is proceeding: Provided, however, That motor cycles need display only one white light visible in the direction in which they are proceeding.

Every operator of a motor vehicle shall sound his horn, bell, or signal device, giving reasonable warning of his approach, whenever necessary to insure the safety of other users of the highways, and also when approaching a street or road crossing, dangerous curve, in any of the cities, boroughs, or townships of this Commonwealth, where the proper authorities shall have erected signs, easily readable from the highway and at right angles thereto, bearing thereon, in letters at least five (5) inches in height, the words, "Danger: blow your horn." The unnecessary sounding of bells, horns, or other signal devices, the unnecessary use of muffler cut-outs, or their use when approaching or passing any other vehicle or animal of draft or burden, is prohibited. When signaled to do so, by the driver of any horse or other animal of draft or burden, the operator of a motor vehicle shall stop, and, if circumstances require it, shall stop his engine until the danger has been avoided. When overtaken by any other vehicle legally traveling at a greater speed, the operator or driver of any motor vehicle, when signaled to do so, shall turn reasonably to the right of the center of the highway, allowing the other vehicle free passage to the left. No person shall drive or operate a motor vehicle upon any public street or highway in this Commonwealth having metal spurs or lugs, or other metal projections, more than three-fourths ($\frac{3}{4}$) of an inch in length upon the tires thereof, except upon natural earth roads, or when the streets are covered with ice or snow, so that the safety of other users of the highway makes it necessary.

Speed. Sec. 14. No person shall operate a motor vehicle

on the public highways of the State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger property, or the life or limb of any person; but no person shall drive a motor vehicle at a rate of speed exceeding one (1) mile in two and one-half ($2\frac{1}{2}$) minutes; and no person shall drive a motor vehicle, having solid tires and weighing more than five thousand (5,000) pounds, gross maximum weight of vehicle and load combined, at a greater rate of speed than one mile in four (4) minutes; and no person shall drive a motor vehicle, having solid tires and weighing over ten thousand (10,000) pounds, gross maximum weight of vehicle and load combined, at a greater rate of speed than one (1) mile in five (5) minutes; and no person shall drive a motor vehicle, having solid tires and weighing over fifteen thousand (15,000) pounds, gross maximum weight of vehicle and load combined, at a greater rate of speed than one (1) mile in six (6) minutes: Provided, That the local authorities having charge of any of the highways may, in dangerous or built up sections, place signs marked "Danger: run slow," in letters not less than five (5) inches in height. Said signs to be placed at right angles to, and plainly legible from, the highway, and facing the traffic the speed of which is to be reduced; and at these places the speed limit shall not exceed a rate of a mile in four minutes, for a distance beyond said sign of not more than one-quarter of a mile; and, if such highway is still in a dangerous or built-up section, a second sign similar to the above-described may be erected, and the speed limit shall not exceed the rate of a mile in four minutes, for not more than a quarter of a mile beyond said sign; and as many signs may be erected as may be necessary. At the end of said dangerous or built-up section shall be erected a sign reading, "End of fifteen mile limit," in letters not less than five (5) inches in height; said signs to be placed at right angles to the highway and facing the traffic. When a motor vehicle meets or overtakes a street passenger car which has stopped for the purpose of taking on or discharging passengers, the motor vehicle shall not pass said car on the side on which passengers get on or off until the car has started, or until any pas-

senger who may have alighted shall have reached the side of the road, or any passenger who may be about to board the car shall have done so.

Local Ordinances, etc. Sec. 15. No city, county, borough, incorporated town, or township shall adopt, enforce, or maintain any ordinance, rule, or regulation contrary to or inconsistent with the terms of this act; or fix a rate of speed lower than that permitted by this act; or require of any person any license tax upon or registration fee for any motor vehicle, or any permit or license to operate motor vehicles upon the public highways; except that in parks the proper authorities may restrict the speed of motor vehicles to such a rate as may seem reasonable, provided said rate of speed shall not be less than that allowed other vehicles and that legible signs shall be conspicuously placed indicating the rate of speed permitted. Operators of motor vehicles shall have the same rights upon the public streets and highways as the drivers of any other vehicles, and no public road open to horse-drawn vehicles shall be closed to motor vehicles.

Intoxication. Sec. 16. Any person operating a motor vehicle when intoxicated shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars (\$100), nor more than three hundred dollars (\$300), or imprisonment for not more than one year, or both, at the discretion of the court.

Unauthorized use. Sec. 17. Any person operating a motor vehicle under any other number than that of its registration, or any person operating any motor vehicle without the consent of the owner thereof, or any person operating a motor vehicle the registration of which has been revoked or suspended, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars (\$100), nor more than three hundred dollars (\$300), or imprisonment not exceeding one year, or both, at the discretion of the court.

Officers. Sec. 18. All operators of motor vehicles shall, upon request or signal of any constable or police officer, who shall be in uniform or shall exhibit his badge or other sign of authority, stop and exhibit their registration certificate or li-

cense, if so required, and shall furnish to any legally constituted authority all information in their possession as to the identity of the operator or owner of any motor vehicle.

Arrest. Sec. 19. The constables and police officers of the State, counties, cities, boroughs, incorporated towns, and townships of this Commonwealth may arrest, upon view and without warrant, any person or persons violating any of the provisions of this act; but such officer shall forthwith make and file with the magistrate, alderman, or justice of the peace before whom the person arrested is taken, an affidavit setting forth in detail the alleged violation of the section of the act complained of, and furnish a copy to the person arrested. In the event of an arrest as aforesaid, if the defendant is unable to give sufficient bail for a hearing or for his appearance at court, the magistrate, alderman, or justice of the peace before whom he is first taken shall accept as bail any article of sufficient value, or, provided he is the owner thereof, hold in custody the motor vehicle found in the possession of the defendant; and the court, magistrate, alderman, or justice of the peace, after the trial of the defendant, if in the meantime sufficient bail according to law has been given, shall make such order as to the disposition of such motor vehicle or other article accepted as bail as shall seem just and proper.

Responsibility. Sec. 20. In any proceeding for the violation of provisions of this act, the registered number displayed on the motor vehicle shall be prima facie evidence that the owner of said vehicle was then operating the same: Provided, however, That if at any hearing or proceeding the owner shall testify, under oath or affirmation, that he was not operating the said car at the time of the alleged violation of this act, and shall submit himself to an examination as to who at that time was operating the car, and reveal the name of the person, if known, then the prima facie evidence arising from the registered number shall be overcome and removed, and the burden of proof shifted.

Fines and Penalties. Sec. 21. Any person—except as provided in sections sixteen and seventeen—violating any of the provisions of this act shall be subject to a fine or penalty of not less than ten dollars (\$10), nor more than twenty-five dollars (\$25), to be collected by summary conviction before any magis-

trate, alderman, or justice of the peace, as like fines and penalties are now by law collected; or, in case of non-payment of a fine within forty-eight (48) hours, bail in double the amount of fine and costs being first entered, to undergo an imprisonment in the county prison for a period not exceeding (10) days: Provided, That any person so accused may waive such summary trial or hearing, and secure the right of trial by jury before the court of quarter sessions of the peace for the county in which the offense is alleged to have been committed, by depositing with the magistrate, alderman, or justice of the peace to whom complaint has been made, or before whom he is taken, a sum in double the amount of the fine and costs which might be imposed, or by entering security to pay the same. Any person or persons previously convicted before a court of quarter sessions, or magistrate, alderman, or justice of the peace of this Commonwealth, for any violation of the provisions of this act, shall, upon conviction of a second offense, within a period of one year, be sentenced to pay a fine of not less than twenty-five dollars (\$25), nor more than fifty dollars (\$50); or, in case of non-payment of such fine, to undergo an imprisonment in the county prison for a period not exceeding twenty days. Any person or persons previously convicted before a magistrate, alderman, or justice of the peace of this Commonwealth, for any violation of the provisions of this act, shall, upon conviction of a third or subsequent offense, within a period of one year, be deemed guilty of a misdemeanor, and shall be sentenced to pay a fine of not less than fifty dollars (\$50), nor more than two hundred dollars (\$200); or, in case of non-payment of such fine, to undergo an imprisonment in the county prison for a period not exceeding thirty (30) days. Any person or persons accused of a second or subsequent offense shall have the right to a trial by jury, in the same manner and upon the same condition as is provided for in the case of persons accused of a first offense: Provided, That if, after conviction before a magistrate, alderman, or justice of the peace, the accused desires to appeal to the court of quarter sessions, he shall be entitled to do so, according to law as in other cases of summary conviction, provided he gives a bond conditioned upon securing and prosecuting the appeal

with effect, or otherwise to secure payment of the fine imposed. Proceedings under this act may also be commenced by the issuance of a warrant, in the name of the Commonwealth; which warrant may be served by a constable, policeman, or other officer having authority to serve warrants, in any part of the Commonwealth, and a copy of the affidavit or information shall be served with such warrant. Any officer serving such warrant shall take the defendant before a magistrate, alderman, or justice of the peace of the county in which the defendant is found, who shall take bail for his appearance before the magistrate or justice of the peace who issued the warrant, or for a trial by jury, in accordance with the provisions of this act.

All money, articles of value, or motor vehicles deposited with any magistrate or justice of the peace, as provided in this act, shall be returned to the defendants upon the termination of the cause, or upon the certificate of the district attorney of the county in which the action is brought.

Disposition of Fines. Sec. 22. All fines and penalties, collected under the provisions of this act for violations of the same, shall be paid to the State Treasurer, except those collected for violations of the provisions as to speed or weight, which shall be paid to the treasurer of the city, borough, town, or township wherein the violation occurred, to be used for the construction, repair, and maintenance of the highways thereof; and sworn statements of all fines and penalties so collected shall also be made, upon blanks to be furnished by the State Highway Department, by the burgess, magistrate, justice of the peace, or other officer imposing or receiving the same, to the State Highway Commissioner. Said reports shall be made quarterly, not later than the tenth (10th) day of the months of January, April, July, and October of each year. Any burgess, magistrate, justice of the peace, or other officer, who shall fail to make such quarterly reports and returns, or either of them, shall be deemed guilty of a misdemeanor in office, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars (\$100), nor more than five hundred dollars (\$500), or imprisonment in the county jail for a period of sixty (60) days, or both, at the discretion of the court.

Egan, Appellant, vs. Claysville Borough, et al.

Boroughs—Ordinances—Increase of Indebtedness—Desire Ordinance.

The expression of desire to increase indebtedness may be included in the same ordinance by which submission to the electors is provided. Two separate ordinances are not necessary.

C. P. Washington Co., No. 2114, In Equity.

Supreme Court, No. 220, Oct. Term, 1912.

Irwin Cummins, for appellant.

B. B. Barr, and Albert S. Sprowls, for appellees.

From 239 Pa. Supreme Court Reports 259.

Opinion by Elkin, J., February 3, 1913:

The town council of the Borough of Claysville by ordinance took the necessary steps to provide for the submission of the question of increasing the municipal indebtedness to a vote of the electors. The election was held in accordance with the provisions of law and the increase was authorized. Appellant, a resident taxpayer, seeks to enjoin the borough authorities from issuing and selling bonds authorized to be issued by council in accordance with the wish of the people as expressed at the election held for the purpose of voting on the increase of indebtedness. The position of appellant is technical, and upon the merits of the case not convincing, but if it is the law, he has the right to assert it and the courts cannot disregard it. His main contention is that the borough council did not by separate ordinance express a desire to increase the indebtedness. It is urged that the duty of the council to express this desire by a separate ordinance was ruled by *Hoffman v. Pittsburgh*, 229 Pa. 36, and *Bullitt v. Philadelphia*, 230 Pa. 544. The learned president judge of the court below after giving these cases careful consideration reached the conclusion that the facts of the present case differentiated it in principle from the cases cited and relied on. The court below, among other things, said, "but the council had to not only express its desire to in-

crease the indebtedness but had to fix the time for holding the election and give the requisite notice. They could do this by passing two separate ordinances, first one expressing their desire to increase the indebtedness and the other proclaiming an election and fixing the time therefor, at which the people might express their desire on the matter. Or, if they so wished, there certainly is no prohibition of law against their including both of these matters in one ordinance, including the first in section one, and the second in section two, so that each would be separate and distinct." This, in our opinion, is a correct statement of the law and what was said in the above cited cases when understood as applicable to the facts is not inconsistent with this view. In the cases relied on by appellant the municipal authorities had entirely failed to express any desire on the question of increasing the indebtedness and this was the controlling thought in the mind of this court in passing upon the validity of the bond issues then pending. In the present case the borough council did express a desire to increase the indebtedness; this desire was expressed in a separate and independent section of the ordinance; and this expression of desire represented the independent action of council. The mere fact that in a subsequent clause of the ordinance provision is made for an election, does not make the expression of desire any less the separate and independent action of council. What was done in the present case was a reasonable compliance with the requirements of the statute and was not in disregard of any provision of law.

On all the other questions raised by this appeal nothing of value can be added to what was said by the learned court below in the opinion dismissing the bill. We concur in the views therein expressed and are of opinion that the bill was properly dismissed.

Decree affirmed at the cost of appellant.

Storch vs. Lansdowne Borough, Appellant.

Boroughs—Ordinances—Increase of Indebtedness—Desire ordinance.

The expression of desire to increase indebtedness may be included in the same ordinance by which submission to the electors is provided. Two separate ordinances are not necessary.

C. P. Delaware Co., No. 37, In Equity, Sept. T. 1912.

Supreme Court, No. 387, January Term, 1913.

Fred Taylor Pusey, for appellant.

Chas. C. Townsend, and A. Culver Boyd, for appellee.

From 239 Pa. Supreme Court Reports 306.

Opinion by Moschzisker, J., February 24, 1913:

(Mr. Justice Brown filed a dissenting opinion.)

These proceedings were instituted to test the legality of a bond issue authorized by a majority vote of the electors of a borough. The borough in question passed an ordinance entitled "An ordinance for the increase of the indebtedness of the Borough of Lansdowne in the sum of \$75,000.00, for the purpose of . . . and further providing for a special election to authorize the same." The first section expressed in proper language the desire of the corporate authorities that the indebtedness should be increased, and the second provided "That a special election shall be held . . . for the purpose of submitting to the electors the question of whether or not the indebtedness shall be increased. . . ,"

and for due legal notice of the election. The court below adjudged the ordinance invalid and enjoined the loan, upon the ground that the increase of indebtedness was illegal because the corporate authorities had "signified their desire that the debt should be increased and provided for an election to obtain the assent of the electors thereto in one and the same ordinance"; citing as authority *Hoffman v. Pittsburgh*, 229 Pa. 36, and *Bullitt v. Philadelphia*, 230 Pa. 544. Courts only adjudicate issues directly raised by the facts in a case or necessary to a

solution of the legal problems involved. In neither of the foregoing cases were the facts like those at bar; as correctly stated in the opinion of the learned court below: "In the Pittsburgh case the ordinance merely submitted the question to a vote of the people, without first signifying the desire of the city to increase the indebtedness. In the Philadelphia case, the councils passed an ordinance authorizing the loan and the submission of the question to the electors, without first signifying the desire of the authorities to increase the debt. In both cases the court held the loan invalid because of the failure to signify by ordinance the desire of the municipal authorities to increase the loan." In other words, the facts of the cases cited and relied upon by the court below did not directly or indirectly raise the question involved in this appeal, viz, when the desire to increase a municipal indebtedness is properly expressed in an ordinance duly passed, does the ordinance become invalid if in a separate section it provides for an election to pass upon the loan and for notice thereof. But in the recent case of *Egan v. Claysville Boro.*, 239 Pa. 259, the exact question at bar was determined as contended for by the present appellant, our brother Elkin on a like state of facts saying, "The borough councils did express a desire to increase the indebtedness; this desire was expressed in a separate and independent section of the ordinance; and this expression of desire represented the independent action of councils. The mere fact that in a subsequent clause of the ordinance provision is made for an election, does not make the expression of desire any less the separate and independent action of councils. What was done in the present case was a reasonable compliance with the requirements of the statute and was not in disregard of any provision of law."

We need only add that we see no merit in the contention that the title to the ordinance under consideration is defective; it is not misleading and it is sufficiently full and specific reasonably to lead to an inquiry into the body of the ordinance; which is all that is necessary. In our opinion the borough authorities have complied with all the requirements of the law. The assignments of error are sustained, the decree of the court below is reversed, and the bill is dismissed at the cost of the appellee.

Benjamin Oister vs. Borough of Pottstown.

Boroughs—Sidewalks—Negligence—Notice—Contributory Negligence.

A borough may pile bricks along the curb where repairs are being made; and a loose brick on the sidewalk, which could have been seen if the plaintiff were observant, is not negligence on the part of the borough.

C. P. Montgomery Co., No. 94, June Term, 1912.

O. L. Evans, for plaintiff; Jesse R. Evans for defendant.

Opinion by Swartz, P. J., June 2, 1913:

The plaintiff claims that he fell over a loose brick or bricks, on the side walk on the south side of Beech street. The Borough was repairing the driveway of said street and a row of bricks had been piled along the curb of the pavement. The work of repair was finished at the locality where the plaintiff fell. Whether any bricks remained piled along the curb, at the time the plaintiff had the accident, is at least doubtful, under the testimony.

The plaintiff says that there was more than one brick on the side walk. The number he cannot give and will not trust himself beyond the statement that there was more than one. Some unauthorized person apparently threw or caused the brick to remain on the side walk. The accident occurred on October 30, 1911, sometime after four o'clock in the morning, at a point about sixty or seventy feet from the corner of Beech and Penn Streets. Loose bricks had been seen on the side walks in the locality of the accident, but it is not shown when any brick was seen anywhere near the vicinity of sixty or seventy feet from Penn Street. The accident occurred on Monday morning, and there was no evidence that a single brick was seen anywhere near the point where the plaintiff fell, either on the Saturday or the Sunday prior to the accident. If there were any loose bricks at this point they must have been removed before Saturday, the 28th of October. If the plaintiff fell over a brick at this point, sixty or seventy feet from the corner of Penn and Beech Streets, the fact remains that the

Borough had no actual notice of the obstruction and the condition did not continue for a time, long enough, to constitute constructive notice. Mr. Boyer, apparently, made a strong effort to help the plaintiff's case, but he was compelled to admit that he saw no loose brick on the pavement on the south side of Beech Street for some days before the accident.

The plaintiff could not say whether the electric light at the corner of Beech and Penn Streets was or was not burning, at the time he fell over the brick. Mr. Sands, a witness called by the plaintiff, passed along this pavement about two hours before the accident and he is positive in his evidence that the light was burning at that time. An electric light, on a pole, only sixty or seventy feet away from the point of the accident, should furnish sufficient light to protect a pedestrian. "As to whether sufficient light was provided by the borough, on the night of the accident, we may briefly say that there is no legal obligation, on a municipality, to light its streets when their construction is reasonably safe for travel. That is solely a question for the municipal legislature," *Canavan v. Oil City*, 183 Pa. 616. "A city is under no legal obligation to light its streets and cannot be held responsible for an alleged insufficiency of light," *Horner v. Philadelphia*, 194 Pa. 542. But the plaintiff had sufficient light to see his pathway and there is no evidence that the pavement, as constructed, was not reasonably safe. The plaintiff was asked,—"If you had looked before, you could have seen them (the bricks), the same as you did afterwards? That is true, is it not?" He answered,—"Oh, yes." The plaintiff was familiar with the sidewalk. He used it constantly on his way to and from work. He knew the street was being repaired with bricks piled along the curb. He says it was dark as he passed along the pavement. It was his duty to exercise care according to the circumstances and this means care according to his knowledge of the condition. It is the duty of a foot passenger to look and see where he is walking. Could the plaintiff have seen the brick or bricks, if he had given his attention to the pavement? He says he could if he had looked. He was negligent if he failed to give attention to his footsteps. The simple question is, could the condition of the pavement have been seen if he had given attention to it? He answers this inquiry

in the affirmative and therefore cannot recover. *Robb v. Connells-ville Borough*, 137 Pa. 45. The law requires that a foot passenger, on a pavement, "should be observant where and how he is going, so as to avoid dangers which ordinary prudence would disclose." *Lerner v. City of Phila.*, 221 Pa. 297. Under the facts before us, the question of contributory negligence would have been for the jury, in the absence of the admissions of the plaintiff that he could have seen the bricks if he had looked where he was walking. It is not negligence for the borough to pile a row of bricks along the curb when actual repairs to the street are in operation. This was necessary and hence a lawful temporary obstruction of a small part of the sidewalk. But whether this was an obstruction or whether a danger signal should have been displayed are matters entirely irrelevant, as the plaintiff did not fall over the row of bricks piled along the curb. The evidence even shows that the bricks had been used in finishing the work at this locality. It follows, as we understand the testimony, there was no such piling of bricks along the curb at the time of the accident.

We think the non suit was properly entered. The borough was not liable for the loose brick on the pavement. If some unauthorized person caused it to remain there, the borough had no actual or constructive notice of the obstruction.

The testimony also disclosed that the plaintiff is not entitled to recover, because of his contributory negligence under his own admissions.

And now, June 2, 1913, the motion to take off the non suit is overruled.

Frick et al. vs. St. Clair Borough.

Negligence—Sidewalks—Damages.

The court may charge the jury that the walk was in such bad condition as to make it dangerous and that the plaintiff knew of this condition, and by not taking the good walk on the other side he took the chance and cannot recover.

No. 315, August Term, 1911. C. P. Allegheny Co.
W. C. McClure, for Plaintiff.
Chas. T. Moore, for Defendant.

Opinion by Frazer, P. J., June 12, 1913:

The plaintiff, Elmer C. Frick, a young man, when returning from work about six o'clock on the evening of September 5th, 1910, was thrown to the ground by a board in the sidewalk, upon which he was walking in company with his brother-in-law, tilting up and tripping him. The verdict was in favor of defendant, and this motion followed. The reasons assigned, in substance, are: (1) that we erred in stating to the jury that if the boardwalk was defective and plaintiff knew that fact and used it instead of taking a good walk on the opposite side, he took the chance and would be guilty of contributory negligence; (2) that we erred in admitting certain evidence as to the time plaintiff worked after receiving the injury, and (3) that we should not have said to the jury that in cases of this kind the owner of the premises was primarily liable. In our answer to defendant's fifth request we did not say, as contended, that plaintiff was bound to cross over to the other side of the street and use that boardwalk. What we did say was "if the boardwalk was in such bad condition as to make it dangerous and plaintiff knew of that dangerous condition and used it instead of taking a good walk on the opposite side of the street, if there was such a boardwalk at the time, he took the chance and cannot recover." Plaintiff himself testified that the walk on the opposite side of the street was in good condition, and there was no evidence to the contrary. While the testimony of plaintiff's witnesses was to the effect that the walk used by him was "out of repair, some boards loose, some rotten," other witnesses said the walk was in "bad condition," "some boards missing," "some rotten, others broken," and that this condition had existed for five or six months previous to the accident. Plaintiff lived within a few feet of the place where the accident happened, passed over the walk at least twice every day, and must certainly have known of its condition. Under these circum-

stances we are of opinion our answer to defendant's third point was not error. We have not been referred to any case in which it has been held to be error to refer in the charge to the fact that the property owner is primarily liable for injuries which result from the use of a defective sidewalk if that liability is not made too prominent. That it is the primary duty of property owners along a street to keep in repair the sidewalk in front of their respective properties has been held in many cases, a late one being *Militzer vs. Hogg*, 192 Pa. 144. In the present case we referred to the liability of both the municipality and the owner, and merely stated to the jury under what circumstances the liability of each arose. A reference to this separate liability was made but once, and in our opinion the property owners liability was not put so prominently before the jury as to prejudice plaintiff. The evidence in regard to the number of days plaintiff worked after the accident, at the mill at which he was employed, we think was rightly received. The testimony was that of the timekeeper and he produced the "time sheets" which showed the days plaintiff received pay for, and also the days on which the mill was shut down. The questions for the jury were defendant's negligence and plaintiff's contributory negligence, both of which questions we think were fairly submitted, and the verdict should not be disturbed, as there was ample evidence to sustain the finding.

And now, June 12th, 1913, new trial refused.

Porter vs. Tionesta Water Supply Company.

Boroughs—Water Companies—Extension of lines.

Where it appears that the management of the company is not arbitrary or oppressive and is exercised in a reasonable and proper manner under the circumstances, the court will not by preemptory mandamus compel the extending of the company's lines into a remote section of the borough.

C. P. Forest Co., No. 1, Nov. T., 1912.

Opinion by Hinckley, P. J.:

The facts involved in this proceeding were agreed upon by the parties and a written stipulation concerning the same was filed of record.

It appears from this stipulation that the Tionesta Water Supply Company is a corporation organized under the act of assembly of April 29, 1874, and its supplements, on or about April 24, 1928, for the purpose of supplying water to the public of the borough of Tionesta, Pa., and to such persons and corporations residing therein and adjacent thereto as may desire the same, having a capital stock of \$20,000.

The company has been engaged in the business of supplying water some nineteen years to citizens of the borough, also for borough purposes, and has earned about four per cent. upon its capital.

The total assessed valuation of the taxable property in Tionesta borough is \$152,720. The borough pays the water company \$204 per year for maintaining hydrants for fire purposes.

The occupants or owners of seven houses have applied to the company to have a main extended about eighteen hundred feet to supply these houses. There are fourteen houses in all on the proposed extension, but seven owners have not joined in this petition.

The assessed valuation of the seven properties of the petitioners is \$1,125. If all the applicants become users of the water from the company's mains, the total amount of increase which would be payable from the houses upon the seven properties would be \$52.50. The cost to the company of making the extension would be about \$1,800. In the statements of fact agreed upon it does not appear that the petitioners have agreed to become consumers if the line is extended, or to become responsible in any way for any return upon the investment.

The territory in question is away from and outside of the business portion of the borough, no stores or business of any kind in the locality, the houses are small, occupied by tenants only when rented, and payment of water rent depends upon

whether the house is rented, the territory is sparsely settled, and there are no prospects of any further improvements or settlements in that locality.

It further appears that the Tionesta Water Supply Company carefully considered the advisability of putting in the line asked for, and after mature deliberation and ascertaining that the water rents would, if paid, amount to only about three per cent. of the cost of the line, concluded that it would be unjust to the stockholders to put in the line in question and declined to do so.

There is no allegation in the petition that the defendant company has failed to properly enter upon its business in good faith in the borough of Tionesta; and it is practically conceded that this is the fact and that such has been the case for many years.

Neither the borough of Tionesta nor the commonwealth is a party to this proceeding, but the petitioners are individuals who ask the court to direct the issuing of a mandatory writ to compel the company to make an extension to its lines of \$1,800.

The ground upon which the company refuses to act, as above set forth, is that the expenditure is unwarranted, considering all of the circumstances. It does not appear that the company would necessarily receive any income from the extension, as the petitioners do not agree to become consumers, but assuming that they would do so, and that all seven paid the regular water rates, the total revenue to be derived by the company per annum would be \$52.50, which would yield perhaps three per cent. upon the cost of installation, which would require the revenues of the company for at least two years to pay for the same. And it also is further shown that there is no prospect of further settlement or development in the section in question.

Under these circumstances, the action of the company would seem to be not unreasonable in refusing to make the extension, and the company could not be charged in acting in an unjust, oppressive or arbitrary manner.

If it were within the power of the court to compel this ex-

tension to be made, then there would be no limit to the additional extensions which could be required from time to time into the remotest sections of the borough, regardless of the question of cost or remuneration to the company, or the resources of the company.

We have not been furnished by the counsel with any reference to our laws, statutory or otherwise, giving any authority to this court to grant the writ in question, but such adjudication as has come to our notice is to a contrary effect.

An application similar to this one was presented to the court of common pleas of Allegheny county. *Euwer v. Trafford Water Co.*, 53 P. L. J. 323. In that case the water company was supplying water under an ordinance which contained a provision that "the company shall extend its lines from time to time as councils may direct." The court in that case entered judgment against the petitioners and denied the writ, stating, among other things: "It seems to us it has done and is doing all that it is reasonably required to do under its charter and the ordinance by which it is authorized to supply water within the plaintiff borough. Under these circumstances, to require it to expend \$30,000 merely for the purpose of piping a plan of vacant lots, with no assurance of receiving at least a reasonably adequate return therefrom, would be unreasonable and unjust."

While there is a paucity of authority relating to water companies, there are numerous decisions in this and other states relating to gas companies, which by way of analogy would seem to have some application to the facts here.

At common law there was no obligation upon a gas company to supply either the municipality or an individual with gas. And this is true of the early decisions in this country and England. The right to have gas delivered by a gas company was placed purely upon contract; and aside from a contract it was considered that no obligation rested upon the company to furnish it. A gas company was regarded as a purely private concern, being neither a public or quasi-public corporation. It was regarded the same as if it were an individual—a person who owned the gas plant and manufactured gas. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242;

Com. v. Lowell Gas Light Co., 12 Allen (Mass.) 75; McCune v. Norwich City Gas Co., 30 Conn. 521; Patterson Gas Light Co. v. Brady, 3 Dutcher (N. J.) 245.

The more recent cases have, however, laid down a broader rule, the full extent of which is that gas companies must supply those whose property abuts upon their lines. *State v. Consumer Gas Trust Co.*, 157 Ind. 345; 61 N. E. Rep. 674; *Portland Nat. Gas and Oil Co. v. State, ex rel. Keen*, 135 Ind. 54; *Griffin v. Goldsborough Water Co.*, 222 N. C. 206; *Shepard v. Milwaukee Gas & Light Co.*, 6 Wis. 539; *Hangen v. Albina Light & Water Co.*, 21 Ore. 411; *Com., ex rel. Stern v. Wilkes-Barre Gas Co.*, 2 Kulp 499.

In the foregoing cases the decisions arose in instances where the companies were contesting against the position that they must supply property-owners abutting upon their lines, and in these cases, as shown by the authorities above, it was held that the property-owner was entitled to be furnished with gas from the line in a public street abutting his property. None of these authorities undertake to lay down any broader rule.

In some other states it has required positive legislative enactment to compel gas companies to extend their lines.

In the case of *Beck v. Penna. Gas Co.*, 18 D. R. 245 (1908), a citizen petitioned for writ of mandamus to compel the defendant company to extend its lines under an ordinance passed after the company had gone into operation. The court denied the writ, although in that case the municipality, a number of years after the company had gone into operation, had passed an ordinance compelling the company to extend its lines, basing its right to pass such ordinance upon a provision in the original ordinance permitting the company to enter the city.

By act of assembly, May 28, 1907, P. L. 278, a special provision is made that where a water company obtains its water supply from a source within the limits of a municipality, borough, etc., fails to furnish water in any district, the matter must be submitted to the state water supply commission.

It does not appear that the Tionesta Water Supply Company is within the class of companies described in this act; but the act is suggestive in that it has seemed necessary that

legislation be made to meet a situation similar to the one arising here.

In the case at bar the defendant company having refused to extend its lines of pipe, and such determination having been reached after due and careful deliberation on the part of the company, and the action not appearing to be arbitrary, oppressive or unjust, but based upon reasonable and proper grounds; and there being no complaint or action by the borough of Tionesta or the commonwealth; in the absence of any statutory enactment, charter requirement, municipal ordinance or contract, the writ of mandamus as prayed for is refused and the petition dismissed at the costs of the petitioners.

Borough of Glenfield et al. vs. Manufacturers Light & Heat Company.

Boroughs—Franchises—Rights of Beneficiary—Third Parties.

A franchise to a natural gas company which contained the condition that it supplied the churches in the borough with gas free, is in the nature of a contract; and although the churches are third parties and paid no consideration, they had vested rights which could not be divested by the borough's repealing the original franchise and granting another which did not provide for furnishing gas free to churches.

C. P. Allegheny Co. No. 12, First Term, 1911.

Robb & Miller, for plaintiffs.

Weil & Thorp, for defendant.

Opinion by Swearingen, J., May 3, 1913:

From the decision heretofore rendered in the above stated case, it appears that the Borough of Glenfield enacted an Ordinance, January 4, 1886, granting the Baden Gas Company the right to occupy the streets and alleys of the borough with its

pipes and conduits for supplying natural gas to consumers; that said borough enacted another Ordinance, August 2, 1886, granting J. M. Guffey and Company the same rights in such streets and alleys for the same purposes; that both of said grantees agreed, as part of the consideration for said grants, that they would supply gas, free of charge, to all the churches of the borough; that in pursuance of the foregoing, the said grantees laid their pipes and conduits in the streets and alleys of the borough, and thereafter supplied natural gas to consumers, including said churches, which accepted the provisions of said Ordinances for their benefit and equipped their buildings so as to use natural gas for fuel and light; that the rights and the obligations of said grantees passed to the Manufacturers Light and Heat Company, the petitioner; and that, for a period of about twenty-four years, the said grantees and their successor had without protest, performed their obligation to supply natural gas to said churches. In said decision, it was determined that said Ordinances and the acceptance thereof constituted contracts which were obligatory upon this petitioner. Accordingly, an injunction was granted, restraining the Manufacturers Light and Heat Company from discontinuing the supply of gas to said churches, they having refused its demand to pay for the same thereafter. This decision was affirmed upon appeal, January 6, 1913; 238 Pa., 395.

Thereafter, on January 22, 1913, the Borough of Glenfield enacted another Ordinance, granting the Manufacturers Light and Heat Company the right to transport through and supply natural gas in said borough, regulating the same, providing that said corporation should pay the expense of enacting the Ordinance and the costs in the above stated case, and repealing said Ordinances of January 4 and August 2, 1886. In the Ordinance of January 22, 1913, the Manufacturers Light and Heat Company was not required to supply natural gas free of charge to said churches. A copy of the Ordinance, marked "Exhibit A," is attached to the petition hereinafter mentioned and is made part thereof.

Thereupon the Manufacturers Light and Heat Company presented its petition, reciting in detail the foregoing, and it

prayed that said injunction be dissolved and the decree amended. The said churches filed an answer, wherein they denied the power of the Borough of Glenfield and the Manufacturers Light and Heat Company to deprive them, without their consent, of the right to use natural gas in accordance with the aforesaid contracts. No testimony was taken by any party, and the cause was argued upon petition and answer.

The main question raised by the petition and answer is: Whether or not these churches have standing to contest the aforesaid attempt of the borough and the petitioner to deprive them of the use of natural gas free of charge. The petitioner contends that they do not, because they were not parties to the original contract, nor were they parties to the consideration therefor, and consequently they cannot be heard in case the parties thereto rescind the contracts; and it is contended that this has been done. These propositions are denied by the said churches.

By the express terms of said contracts, the Borough of Glenfield granted the second parties therein the use of the highways of the borough for the purpose of conducting the business of supplying natural gas to consumers for compensation. This was, in effect, a transfer of property. The subject was a most valuable right to the second parties, which the borough authorities had the power to either grant or refuse. Part of the consideration for said grants was that the second parties should deliver a portion of their property to said churches, to wit: natural gas which, by virtue of said contracts and not otherwise, they were permitted to bring within the borough limits. The churches thereupon accepted the provisions of the contracts, which were for their benefit alone, and made their arrangements accordingly. They alone were interested in the delivery of the particular gas to them, which the promissors agreed to supply. No other party was interested therein. It was no concern of the borough whether the churches received the gas or whether they did not, as it was under no obligation to furnish them gas, either free or otherwise. It could hardly be doubted that these churches could have effectually released the petitioner from its obligation to deliver gas to them and that such release would have

in no way impaired its rights to continue the occupation of the highways of the borough for the transaction of its business. If this be true, why were these churches not parties to the consideration for the contracts? Their rights arose simultaneously with the making thereof. By acceptance of the provisions thereof for their benefit, these rights became vested. They thereby became property rights of the churches, which the law will protect the same as any other. It is true that no consideration moved from the churches for said contracts. But this is not the test of the existence of the relation called, "party to the consideration." That relation is created when by contract a party agrees to deliver a thing of value to a third person, in which delivery the latter alone is interested.

If the foregoing reasoning be correct, it follows that said churches have standing to litigate their rights in their own names. When their rights became vested, it was no longer possible for the borough and the petitioner to destroy them, in the manner hereinbefore described. We think the case of the churches is clearly within the exception to the rule, that prohibits an action upon a contract by anyone, not a party thereto.

"At common law no one could maintain an action upon a contract to which he was not a party. . . . There are, however, exceptions to the rule, which, in this State, are as well settled as the rule itself. For nearly three-quarters of a century since the decision in *Blymire vs. Boistle*, 6 Watts, 182, the decisions of this court have uniformly recognized and enforced the exceptions whenever the facts of a case required it." *Howes vs. Scott*, 224, Pa. 7.

"Where one person entered into a contract with another to pay money to a third or to deliver some valuable thing, and such third party is the only one interested in the payment or delivery, he can release the promissor from performance or compel performance." *School Dist. vs. Nat. Gas Co.*, 18 Supr. Ct., 73; *Sewickley School Dist. vs. Nat. Gas Co.*, 154 Pa., 539.

"He for whose benefit a promise is made may maintain an action upon it, although no consideration passed from him to the defendant, nor any promise from the defendant to the plaintiff." *Hind vs. Holdship*, 2 Watts, 104.

Moreover, this does not appear to us to be a case, where the petitioner has been rendered unable to perform its obligations to these churches. The Ordinance of January 22, 1913, does not require the petitioner to surrender any of its existing rights. It appears to be nothing more than a grant of rights to be exercised in futuro. Upon acceptance thereof, the petitioner is not obliged to do anything with respect to its appliances already in the streets and alleys in the Borough of Glenfield. There is no evidence that, in pursuance of the Ordinance, a pipe was lifted or a single connection severed. There is no claim that any right purporting to be conferred thereby has ever been exercised. So far as we are aware, gas is still being supplied through the same pipes and in the same manner as under the Guffey and the Baden Gas Company Ordinances. In other words, the Manufacturers Light and Heat Company has surrendered nothing whatsoever. It is in the Borough of Glenfield in precisely the same manner as it was prior to the passage of the Ordinance of January 22, 1913. It does seem to us that, even if it were competent for the borough and the petitioner to deprive the churches of their rights without their consent, something more substantial would be required to be done than the mere passage of an Ordinance, such as the one last mentioned.

We are of opinion that, under the facts presented, we ought not to interfere with the decree hereinbefore entered.

And now, to wit: May 3, 1913, after argument and upon consideration, the prayer of the Manufacturers Light and Heat Company for dissolution of the injunction heretofore entered and amendment of the order and decree heretofore made in the above stated case, is refused.

Braucher vs. Borough of Somerset.**Boroughs—Grading—Streets—Damages.**

Damages to a lot owner by grading a street along previously opened may be recovered, including damages from changing grade of sidewalk, even though such grading of sidewalk has not actually been done.

C. P. Somerset Co., No. 23, December Term, 1912.

C. W. Walker and Alexander King, for plaintiff.

Norman T. Boose, for defendant.

Opinion by Ruppel, P. J., July 28th, 1913:

HISTORY OF CASE.

Plaintiff was owner of a lot fronting on a street long before laid out and used by the public, adjusting the elevation of his building which he erected to the grade of street as it then existed; a grade had not been established by the borough. After the building was up and occupied, the borough established a grade and cut down the cartway of the street to a depth of about 5 feet. The pavement was not cut down, left remain as it was when building erected, but owner had no means of access to his house for putting in coal, etc.

He proceeded by petition under the act and viewers made report, from which borough appealed and the case was tried before a jury. On this trial defendant (borough) contended that plaintiff was not entitled to prove or recover damages that might be caused by cutting down the sidewalk to the grade of the cartway, which it had established and to which grade the cartway was cut down, because the sidewalk or pavement part of the street had not been cut down. This position the judge denied and instructed the jury "to estimate the damages as they will be when the sidewalk is lowered."

QUESTION INVOLVED.

Is plaintiff entitled to recover all the damage that may result to his property by grading the street on which property abuts, which had previously been laid out and used, where only the cartway is graded, or shall the jury estimate damages including such as may be caused when the pavement or sidewalk is graded?

Only one of the reasons assigned for new trial is urged in the argument by the counsel for the borough, namely, that the Court was in error in the charge to the jury in reference to the lowering of the sidewalk. That portion of the charge complained of reads as follows:

"We say to you as a matter of law that under this ordinance and under the acts of the borough you shall estimate the damages as they will be when the sidewalk is lowered; there cannot be two suits for the same injury to this property, and all damages that are done by the grading of that street must be settled in this suit, and therefore, your verdict will be based upon the damages that plaintiff has sustained, including the lowering of the pavement down to the level of the cartway."

As the evidence showed that the borough had only lowered the grade of the street proper, or driveway and not the sidewalk, it is argued that the jury should have been directed to find only such damages as were sustained by reason of the work already done, and that if the borough subsequently concluded to lower the sidewalk, then the damages will have to be ascertained and paid after that is done, and to the person who is the owner of the property at that time. It developed at the trial of the case that since the street was graded, the plaintiff, Braucher, had sold the property to Dr. E. F. Shaulis, and the borough solicitor now contends that when the sidewalks are lowered Dr. Shaulis will have a claim against the borough for whatever damages may be occasioned thereby. The ordinance under which the work was done reads as follows:

"An Ordinance fixing and establishing the grades of the east and west curb lines of East street from the south curb line of Catharine street to the southern line of Somerset borough. . . .

"Sec. 1. Be it ordained, etc., that the east curb line of East

Street from the south curb line of Catharine Street to the southern line of Somerset Borough be fixed and established as follows, to wit: Beginning at the south curb line of Catharine Street at an elevation of 2,153 feet above borough datum, thence rising at the rate of 9.58 feet per 100 feet for a distance of 290.8 feet to the north curb line of North Street, etc.

"Sec. 2. That the west curb line of East Street from the south curb line of Catharine Street to the south borough line be fixed and established as follows, to wit.: Beginning at the south curb line of Catharine Street at an elevation of 2,153.9 feet above borough datum, thence rising at the rate of 9.58 feet per 100 feet for a distance of 290.8 feet to the south line of North Street, etc."

The above two lines as described pass the plaintiff's property, which is bounded on the east by East Street, and on the south by North Street.

This ordinance was adopted by the borough council on the 10th of April, 1911, approved by the burgess on the 27th of April, 1911.

On the 19th of April, 1912, pursuant to the above ordinance, the council resolved, "that . . . North East Street from North Street to Catharine Street . . . be graded and improved according to plans prepared by the borough engineer, F. B. Fluck," etc.

It will be noticed that the ordinance is specific as to the point at which the grade line is to be determined, namely, the curb. The street proper when referred to in the ordinance includes the driveway, the gutters on either side, the curbing on both sides of the cartway, and the sidewalks. It is a well-known fact that the curbing is set several inches above the level of the cartway at the gutters; and it is also well known that the center of the driveway is usually several inches higher than the edge of the gutters; it is a well-known fact that the sidewalks are usually on a level with the top of the curbing, and therefore, when the council fixed a particular point at which the grade was designated, I take it that it was meant thereby to have the other grades conform to the general rule or practice with regard to the grading of streets. There is nothing in the ordinance or in the reso-

lution or any act of the council indicating an intention to allow the sidewalks to remain elevated some distance above the grade line of the street, and when the plaintiff was notified that the grade had been established as per this ordinance, he had a right to assume that it meant the grading of the entire width of the street between property lines. He also had a right to commence his action or proceedings against the borough the instant the work was commenced pursuant to the action of the council. He was not obliged to wait until the work was completed, and therefore had a right to assume that it was the intention of the borough to lower the sidewalks as well as the driveway.

Counsel for the defendant cites two cases in support of his view, that the lowering of the sidewalks is not to be considered as an element in the present case. *Wilson vs. Beaver Borough*, 13 Pa. C. C. Rep., 75, in which Judge Wickham says:

"In the present case, the ordinance has been carried out to the extent of cutting down the street to the inner line of the sidewalk. The original or natural grade has been preserved and left untouched between the inner line of the side walk and the property line."

The first point of the plaintiff was:

"That the jury in their estimation of damages, if any, to the property in question must treat the street as if opened to the property line."

"Answer. This point as worded can be and is affirmed. The borough has the right to open the street to its full width, and it is already opened to that extent. If the word 'opened' means graded, and I presume that is what was meant, then the point is refused."

The charge, however, seems to clear up this apparent confusion, for the Judge instructs the jury:

"Consider how much, if at all, the property has been injured in market value by that work, as of the time I mention. And also by the conceded right of the borough authorities to cut down the street to the sidewalk level up to the property line. You are not to look at this matter as if the cut was actually made to the property line, but you must consider the right of the borough to make that cut under its ordinance, if it sees fit to do so,

hereafter; . . . Now, how much less, if anything, would parties desiring to buy such property have offered or given for it in 1891, they having a knowledge of its then actual condition, of the physical change made on the street, and also a knowledge of the right of the borough authorities to cut down some more of the street, if they choose to exercise that right."

The other case cited, *McCurdy vs Lineville Borough*, 10 Pa. D. R., 546, is an opinion by President Judge Thomas on exceptions filed to the report of viewers; and as the exceptions are not given, the opinion throws very little light on this controverted question; and a careful examination of these two cases has not changed my opinion with regard to the correctness of the rule laid down in the charge to the jury.

In *Pusey vs. City of Allegheny*, 98 Pa., 522, the controversy arose over the claim for opening and grading a street; the city claiming that the plaintiff could only recover upon one ground in one form of action, and this view was sustained by the court below, but the Supreme Court in reversing, says:

"Hence the plaintiff was entitled to recover whatever damages she had suffered at the hands of the city, whether direct or consequential, and the contention that she must divide her claim, and recover for the property appropriated for the street, under the Act of 1870, and for the injury resulting from the cutting and grading by a different process under the Act of 1876, cannot be sustained. Such a method of splitting up damages resulting from a single transaction, and thus multiplying suits, is contrary to all legal policy."

In *New Brighton vs. Peirsol*, 107 Pa., 280, in a *Per Curiam* opinion, it is said:

"If a grade of the street had been legally established and the work actually commenced on the ground, before the purchase by the defendant in error, the damages should not be so split and divided as to give him a portion thereof. He would take the property *cum onere*."

"It is true, that in a proceeding to recover damages caused by the opening and grading of a street, the party must submit his whole claim, embracing consequential as well as direct injuries." *Jones vs. Bangor Borough*, 114 Pa., 638.

The owner of a property abutting on a street which is graded by the borough, while bound to lay a pavement as directed by the borough, is not required to grade the sidewalk; is not required to either cut or fill extensively.

In Judge McPherson's opinion, *Steelton Borough vs. Booser*, 162 Pa., 630, which was affirmed by the Supreme Court and has been frequently cited and followed, we find this language:

"It was suggested at the trial that the borough was not bound to grade the street between the building lines; that its legal duty was done when the driveway was graded between the lines of the curbs, and that the abutting owners might thereafter be compelled to grade at their own expense as well as to pave the space intended for the sidewalk. To state this proposition is to answer it, as it seems to us. When a borough exercises its discretion and decides to grade a street, the work is necessarily an entirety and the whole of it is to be paid for according to the same rule. It need not all be done at the same time. If it seems wise to cut down or fill up the driveway only, postponing the grading of the sidewalks until the abutting lot come into the market, there can be no objection to this action; but it would certainly be unjust and unequal to grade the public driveway at the public expense, and then compel each abutting owner to grade the public footway at his own expense. . . . If a borough has done its full duty when it has provided a sufficient roadway for vehicles, and if it may then call upon the abutting owners to provide a sufficient sidewalk for pedestrians, it is manifest that much inconvenience and injustice will arise. . . . Moreover—to use a striking illustration put by defendants' counsel—wherever a fill like that now in proof becomes necessary the borough will be compelled to build a wall at the curb line to hold up the roadway, and the lot owner will be compelled to build a second wall ten feet distant at the building line to hold up the sidewalk. A theory which leads to such unnecessary expense is put upon the defensive, and needs the support of convincing argument before it can hope for acceptance."

The action of the council in establishing the grade of the street without differentiating between the sidewalk and the cartway in any way in my opinion established the grade for the entire street between property lines.

In *Freemansburg vs. Rogers*, 6 Sadler, 1, Judge Reeder in charging the jury said:

"There is no contention that that grade so left by the borough in 1858 was ever fixed by any subsequent ordinance or resolution by the borough until 1870, when it adopted this official map which is in evidence, and which fixed the grade of that street. When that map was adopted fixing the grade of Main Street in front of that property, that fixed the grade of both the pavement and the street."

That portion of the charge was assigned as error in the Supreme Court, but the judgment was affirmed in a *per Curiam* opinion.

"Borough authorities alone have power to change the grades of streets and alleys, and an ordinance authorizing a raising of the tracks of a railroad company, which necessarily involves changes in grades of streets, must be construed as an ordinance of a borough providing for changes in the grades of its highways crossed by the railroad." *Lewis vs. Homestead*, 194 Pa., 199. *Chester City vs. Lane*, 24 Pa., Sup. Ct., 359.

In *Righter vs. Philadelphia*, 161 Pa., 73, it is held that where the opening and grading of a street are both done at the same time, the damages must be assessed in one action, although the remedies are under different acts of assembly and the proceedings in different courts.

In *McGar vs. Bristol*, 71 Conn., 652, in an opinion by Mr. Justice Baldwin, this statement is made:

"The damages recoverable for a change of grade in the highway include such as may result from any change in that of the sidewalks. That is, when constructed on the highway, from a part of it, and it is within the discretion of the municipal authorities whether they shall or shall not be maintained on a level with the roadbed traveled by vehicles. To change their grade is to change in part that of the highway, although in other respects it may be left unaltered."

In *Dawson vs. Pittsburgh*, 159 Pa., 317, it is held that where the grading the street leaves the owner's property in a depression, the jury could consider what it would cost to make the fill, as an element of damage.

And in *Mellor vs. Philadelphia*, 160 Pa., 614, it is held that the owner of property injured by change of grade is entitled to damages although his property did not abut on the street graded.

The borough had the right to adopt ordinances general in character or make specific provisions.

"The grading here referred to is only such as is incidental to the sidewalk, as distinguished from the general grade of the street. Under the terms of this enactment the city would, undoubtedly, have the power to ordain a reasonable regulation as to the height of the sidewalk above, or its depth below, the grade of the street, or that footways should slope towards the street, or that they should have foundations of a certain character and be constructed in a certain manner. . . . It was held by Judge McPherson, in an opinion which was adopted by the Supreme Court, that when a borough exercises its discretion and decides to grade a street, the work is necessarily an entirety, and the whole of it has to be paid for according to the same rule. That it would be unjust and unequal to grade the public driveway at the public expense, and then compel each abutting owner to grade the public footway at his own expense." *Philadelphia vs. Weaver*, 14 Pa., Sup. Ct., 293; *Black vs. Roebuck*, 17 Id., 324.

Another controlling principle leads to the same conclusion. The right of action begins as soon as the borough has commenced its work on the ground and from that time the statute of limitation begins to run.

O'Brien vs. Railroad Company, 119 Pa., 184.

Volkmar St. Philadelphia, 124 Pa., 320.

Whitaker vs. Phoenixville Boro., 141 Pa., 327.

Plan 166, 143 Pa., 414.

Ogden vs. Philadelphia, Id., 430.

Righter vs. Philadelphia, 161 Pa., 73.

McCurdy vs. Linesville Boro., 10 Pa. D. R., 546.

Nyhart vs. Taylor Boro., 31 Pa. Sup. Ct., 635.

In the last case Mr. Justice Porter uses this language:

"The right of the plaintiff to recover damages for the injury to his property resulting as a natural and necessary consequence of the grading of Main Street arose as soon as the work

was commenced upon that street in front of his property." And the statute of limitation would begin to run from that time.

Landes vs. Borough of Norristown, 21 W. N. C., 212.

Therefore, as the ordinance and resolution of the town council were in general terms without making a distinction in the grade between the cartway and the sidewalk, the plaintiff was at liberty to commence proceedings as soon as the borough commenced its work, and had the right to assume at that time that the entire street between property lines would be graded.

In Somerset Borough the rule has been on all work done that the borough pays for the paving of one-third of the width of the driveway, and the property owners on either side for the other two-thirds.

That Dr. Shaulis, the vendee, is not entitled to any damages by reason of the work done in pursuance of the ordinance and resolution in evidence, is shown by *New Brighton vs. Peirsol*, 107 Pa., 280.

The conclusion I have arrived at therefore may be summed up as follows:

1. All damage accruing from the grading which has been done and that contemplated by the ordinance are to be recovered in this action; and therefore, when the sidewalk is lowered to the grade of the cartway by the borough, no further claim can be maintained against the borough.

2. The borough has the right to lower the sidewalk in front of plaintiff's property at any time it sees fit, without any further action by its council, or without any further liability for damages.

3. The owner of the property has the right to require the borough to lower the sidewalk to the grade or level of the cartway at any time he desires.

The motion for new trial is overruled, and judgment is directed to be entered on the verdict in favor of the plaintiff upon payment of the jury fee.

State-aid Highways.**State-aid Highways—Maintenance—Act of May 31st, 1911.**

Under the above act if counties and townships fail to pay their share of the cost of maintenance, the same may be charged against funds in the hands of the state. Prior to the above act no part of the cost of maintaining a state-aid road could be collected from the borough unless the road forms part of the state highway.

Opinion by Bell, Attorney General, September 11th, 1912, to E. M. Bigelow, State Highway Commissioner:

This department is in receipt of two communications from your department, under dates of June 20 and July 18, 1912, both of which refer to the same subject.

In substance, your department asks to be advised how fifty per cent. of the cost of maintaining State-aid Highways constructed prior to the approval of the Act of May 31, 1911, (P. L. 468), is to be collected when such highway is located (a) in a township or townships, and (b) in a borough or incorporated town.

The answer to this question is found in the provisions of the said Act of 1911.

The Highway Act of 1911 is intended to provide a comprehensive system for the improvement of the principal highways of the Commonwealth. Two separate and distinct classes of improved highways are provided for in this legislation:

1st, State Highways, to be constructed, improved and thereafter maintained and repaired by the State Highway Department at the cost and expense of the Commonwealth, (Sections 6 and 11); with the single exception of the liability of a borough or incorporated town to pay, in some cases, fifty per centum, and, in other cases, the entire amount, of the expense of maintaining any road, street or highway within the limits of such borough or town, and which shall form a part or section of any State Highway (Section 10).

2nd, State-aid Highways, to be improved and subsequently maintained through State-aid extended, under certain limitations and conditions, to counties, townships and boroughs, severally, or jointly to counties and townships, or counties and boroughs. The State-aid Highways constructed under the act are to be maintained at the joint expense of the State and the townships or boroughs in which they are located, or, at the joint expense of the State and a county, where a State-aid Highway has been constructed upon the petition of a county without the co-operation of a township or borough.

The method of certifying and paying the cost of the original improvement and subsequent maintenance of State-aid Highways constructed under said act, and the method of collecting from the respective counties, townships and boroughs their proportionate shares of the same, are prescribed in the 33rd section which reads in part as follows:

"The total cost of the improvement and maintenance of the State-aid Highways constructed under the provisions of this act, as provided by the terms of the contract, or otherwise as herein provided, when properly certified by the State Highway Commissioner shall be audited by the Auditor General, and when audited and allowed shall be paid out of moneys specifically appropriated for this purpose, by warrants drawn therefor by the Auditor General upon the State Treasurer. The share of the county shall be paid as provided by its contract, and, otherwise, by the provisions of this act, to the State Treasurer by the county treasurer, upon the warrant of the county commissioners, in such sum or sums as shall be certified by the State Highway Commissioner, from time to time, during the performance of the work or contract, or as provided by the contract and, otherwise, by the provisions hereof, after the same shall be completed. The share of the township or townships, or of any borough or boroughs, or of any incorporated town or towns, shall be paid to the State Treasurer by the township supervisors or commissioners, or by the borough treasurer, or by the town treasurer, as the case may be, in the manner and form as in the case of counties, and as other debts of said townships or boroughs are paid, when and as demanded by

certificate of the State Highway Commissioner during the performance of the work or contract, or, in like manner, after the same shall be completed. Upon the completion of any State-aid Highway improvement, or upon the ascertainment of any additional improvement cost, or of any maintenance expense, incurred thereon thereafter by the State Highway Department, the State Highway Commissioner shall certify the same to the State Treasurer and to the county commissioners and township supervisors, or borough or town authorities, as the case may be, the respective shares of said cost or expense for which the county, township, borough or incorporated town is liable. If the said shares or amounts, so certified by the State Highway Commissioner, of the cost and expenses of the improvement, or of the subsequent maintenance, thereof, as provided by contract and the provisions of this act, of the county, township, borough, or incorporated town, or all or either of them, shall not be paid to the State Treasurer within thirty days after being certified, then the said shares of the county, township, borough, or incorporated town, either or all of them, remaining unpaid, shall be charged by the State Treasurer against any funds of said county township, borough or incorporated town which may be in the hands of the State Treasurer, or which may thereafter come into his hands, excepting school funds, and may also be recovered by action at law or equity as any other debts of such counties, townships, boroughs or incorporated towns are by law recoverable."

At the time of the approval of the Act of 1911, there were in existence throughout the Commonwealth, many reconstructed highways, which had been improved through State-aid granted under previous legislation, some of these previously constructed State-aid Highways being located in townships and others in boroughs. Under the old system the duty of maintaining State-aid Highways was imposed primarily upon the townships and boroughs in which such highways were constructed. Experience having, however, demonstrated that this was an unwise policy, the legislature provided, in section 29 of said Act of 1911, as follows:

"The work of maintaining and repairing all State-aid high-

ways, improved under the provisions of this act, or which shall have been previously reconstructed by State-aid, shall be done by the State Highway Department; and fifty (50) per centum of the cost thereof shall be paid by the several townships wherein such roads may lie; or by the county, when such roads have been improved upon the petition of such county without the co-operation of the township."

Under this section, the State is required to maintain and repair all State-aid Highways now in existence including those built under previous legislation, as well as those constructed under the present act.

Confining the discussion to State-aid Highways, constructed prior to the approval of said Act of 1911, it is to be observed that fifty per centum of the present and future cost of maintaining and repairing such highways is required to be paid by the several townships wherein such roads lie, or when such roads have been improved upon the petition of a county without the co-operation of any township or townships, then by such county. The method of enforcing this liability against townships or counties, as the case may require, is provided by the above quoted 33rd section of the act. This disposes of your inquiry in so far as the maintenance of State-aid Highways constructed previous to the passage of the Act of 1911, upon the joint or several positions of townships and counties, is concerned.

To recapitulate then, upon the ascertainment of any maintenance expense incurred upon such roads by your department, you should certify to the State Treasurer and to the proper county or township officials, the total amount of said expense and the proportionate shares of the respective counties or townships, observing the provision that where the road was constructed upon the sole petition of a township, or the joint petition of a county and a township, the proper township or townships are liable for fifty per centum of the cost of maintenance, but where the road was improved upon the sole petition of a county, then the county alone is responsible for one-half of the said cost of maintenance. If the said counties or townships do not pay their proportionate share or shares of

said cost of maintenance, to the State Treasurer within thirty days after your certificate, said shares are to be charged by the State Treasurer against any funds of said county or township which may be in his hands, or which may thereafter come into his hands, excepting school funds, and if there be no funds due to said county or township in his hands against which said indebtedness may be charged, actions at law or equity may be instituted by the Commonwealth to recover the amounts due from the respective counties or townships.

Turning now to the question of the liability of Boroughs, for any part of the cost of maintaining State-aid Highways constructed therein before the approval of said Act of 1911, it is to be noted that the above quoted section 29 of said act contains no references to boroughs. The primary duty of maintaining and repairing all State-aid Highways heretofore or hereafter constructed, whether in boroughs or elsewhere, is imposed by said section upon your department, but the provision in said section for the re-payment to the State of fifty per cent. of the cost of such maintenance applies only to townships or counties. The only reference in the act to the payment by boroughs of a portion of the cost of maintenance of State-aid Highways constructed prior to the Act of 1911 is found in section 10. This section, to which passing reference is made at the outset of this opinion, relates primarily to State Highways as distinguished from State-aid Highways, and after providing that where any road, street or highway, within the limits of any borough or incorporated town, shall form a part or section of any State Highway and the same is not already improved according to the standards of your department, you, as State Highway Commissioner by and with the consent of the borough or town councils, may improve or reconstruct such section of road or street at the expense of the Commonwealth, it is further enacted in said section as follows:

"The maintenance of any road, street or highway, or of any part or parts thereof, improved or reconstructed as a State Highway in any borough or incorporated town, or the maintenance of any State-aid road heretofore improved or reconstructed, and which road forms a part of a State Highway in any borough

or incorporated town, shall be done by the State Highway Department; and fifty per centum of the cost and expense of said maintenance shall be paid by the respective borough or incorporated town in which said work is done, as is provided for in the case of the maintenance of State-aid roads."

This section then contains a proviso to the effect that where any road or street has been reconstructed with bricks or other permanent paving material, such road or street shall be maintained wholly by the borough or incorporated town in which such road or street may lie.

Where, therefore, a State-aid Highway has been heretofore constructed in a borough, and forms a part of a State Highway in said borough, one-half of the cost of maintaining the same (or if it be constructed of bricks or other permanent paving material the entire cost of maintaining the same) is imposed upon the borough by this section.

By the express terms of the section, the method of certifying and collecting the amounts due from such boroughs for maintenance is the same as that provided for in the case of maintenance of State-aid roads. This section has no application to a State-aid road constructed in a borough, prior to the approval of the Act of 1911, unless such road forms a part of a State Highway in said borough. It follows that in so far as the maintenance of State-aid roads heretofore constructed in boroughs, which roads do not form a part of State Highways is concerned, the State is bound to maintain the same, but there is no express liability imposed upon the boroughs in which such State-aid roads have been constructed to contribute and part of the cost of maintenance.

The liability under discussion being purely statutory, and the statute having failed to expressly impose any liability upon the boroughs in question, you are advised that no part of the expense of maintaining State-aid roads constructed prior to the approval of the Act of 1911, in boroughs, can be collected from the boroughs unless (and it is the single exception) such State-aid road forms a part or section of a State Highway.

In Re Grade Crossing in Taylor Borough.

Boroughs—Railroad crossings—Act of 1901, P. L. 531.

A crossing will be permitted under said act where the local conditions, traffic and density of population are considered within the meaning of the said act.

C. P. Lack. Co., No. 418, May Term, 1913.

D. R. Reese and J. H. Oliver, for petitioner,

J. E. Watkins, contra.

Opinion by O'Neill, J., April 24, 1913:

The Act of 1901, P. L. 531, section 4, provides a method by which a railroad or highway may cross each other at grade, outside of cities of the first and second-class. The party desiring such construction shall petition the Court of Common Pleas, and the court shall fix a time for a hearing, at which all persons interested may be heard.

From the evidence produced at the hearing on the petition before us the following facts are established:

1. The construction intended is an extension of a branch of the petitioner's railroad about a mile in length, through a strip of territory located in the northwesterly part of the borough of Taylor from the Archbald breaker to the Pyne breaker. The purpose of the construction is to secure coal and other freight. It is estimated that four trains will pass over the said extension every twenty-four hours.

2. The territory through which the railroad will pass is sparsely settled.

3. It is intended to construct a grade crossing over the highway known as Oak street.

4. The unobstructed view on each side of said railroad varies and is from 500 to 2,000 feet.

The case now before us comes within the requirements of the fourth section of the Act of 1901. It is therefore ordered and decreed that the prayer of the petitioner be allowed, and that the petitioner be permitted to construct its railroad at grade over the highway described in the petition.

We direct the petitioner to pay the cost of these proceedings.

Weaver et al. vs. Lyons.**Boroughs—Street Paving—Rights of Abutters—Equity.**

Where there is a deviation by the contractor from the lines and curbs fixed by ordinance of such a nature as to do injury, the abutters may in equity enjoin the contractor.

C. P. Northumberland Co., No. 363 in Equity.

I. A. DeVitt and Geroge B. Reimensnyder, for Plaintiffs.

C. M. Clement and C. F. Clement for defendant.

Opinion by Cummings, J., January 13th, 1913:

The plaintiffs own land in the Borough of Sunbury, Northumberland County, Pennsylvania, fronting on North Second Street to the extent of ninety (90) feet on the east side of North Second Street and sixty-six (66) feet on the west side of North Second Street. The defendant is a contractor and entered into a contract with the Borough of Sunbury, for the paving of North Second Street, along the properties of the plaintiffs. The width of the paving on North Second Street along the property of the plaintiffs, as provided in the ordinance and contract, is thirty (30) feet. It appears that in constructing the said pavement the defendant did excavate or was attempting to excavate for the purpose of placing curbing and street paving on the west side of North Second Street in front of the properties of Frederick B. Weaver, Mary A. Lilly, Mary Olive Sullivan and C. E. Raker, at a distance of from two to twenty-two inches west of the line fixed for said curbing as marked and designated by the Borough Regulator, and did excavate and attempt to excavate for the purpose of placing curbing and street paving on the east side of North Second Street in front of the properties of W. C. Clark and H. J. Clark at a distance of from two to twenty-two inches east of the line fixed for said curbing, as marked and designated by the Borough Regulator; the said Borough Regulator acting in accordance with the provisions of an ordinance approved July 8, 1912, providing for the paving and curbing of the said street.

Second Street, at the point in question, was laid out and the width of same was fixed by the borough ordinance at forty (40) feet, exclusive of side walks. The part proposed to be paved by the defendant is entirely within the forty foot road or street and not more than twenty feet from the centre line of said road or street. The width of Second Street, from the time that it was fixed by the municipal authorities at forty feet, has never been changed. The defendant, contractor, on or about the second day of November, 1912, while proceeding with the paving of North Second Street and in violation of the borough ordinance approved July 8, 1912, and the contract entered into by the defendant with the Borough of Sunbury, and without any authority in law, did excavate and was then excavating for the purpose of placing curbing and street paving on the west side of North Second Street and immediately in front of the properties of Frederick B. Weaver, Mary A. Lilly, Mary Olive Sullivan and C. E. Raker, at a distance of from two to twenty-two inches west of the line established for said curbing, as marked and designated by the Borough Regulator of Sunbury, acting in accordance with the provisions of the ordinance of July 8, 1912, and did excavate and was then excavating for the purpose of placing curbing and street paving on the east side of North Second Street and immediately in front of the properties of W. C. Clark and H. J. Clark at a distance of from two to twenty-two inches east of the line established for the said curbing, as marked and designated by the Borough Regulator of the Sunbury Borough, acting in accordance with the provisions of the ordinance of July 8, 1912.

From all the evidence in the case we find the following facts:

First. That the roadway on Second Street between Race and Reagan Streets, as established by the ordinance, is forty (40) feet.

Second. That no municipal action has ever been taken whereby the width of the established roadway was changed.

Third. That the work as proposed to be done by the contractor was fully within the forty (40) feet and on the east side and west side respectively, within the distance of twenty (20) feet from the centre line.

Fourth. That the paving ordinance of 1912, and the contract entered into thereunder between the borough officials and the contractor, fixed the width at which the street is to be paved and where the curb is to be located, all under the specification and direction of the Street Committee and Borough Regulator.

Fifth. That the Borough Regulator gave to the contractor the lines for the curbing on the east and west sides of the street along the thirty (30) feet of paving.

Sixth. That the contractor, without any further direction, ordinance or resolution from the town council, attempted and in part did deviate from the lines and curbs so fixed by the Regulator, and so given him from the given point from one to twenty-three inches on the west side and from one to twenty-four inches on the east side, thus narrowing the space left between the curb and the lines.

Seventh. From the evidence taken the court concludes that the plaintiffs would suffer damage to their property by reason of the unauthorized extension of the street paving and curbing.

Counsel for the plaintiffs have submitted the following conclusions of law and requested the court to file the same.

First. "That the attempted deviation on the part of the contractor from the lines given by the Regulator under the ordinance and the contract for the placing of the curb was without warrant or authority in law, he not having received any direction by virtue of any resolution, or of any ordinance, or any action of the town council, and until such action is taken by the town council a contractor must conform to the right fixed by the ordinance, and the contract entered into thereunder, on the part of the borough officials." As between the municipality and the contractor the above conclusion is correct and we so find.

Second. "The evidence in this case showing that the lot owners would be injured, their property be depreciated in value, if the deviation complained of was made, they have a standing in court to maintain this bill.

"1st. By reason of the lot owners abutting on the street

and being directly interested in the width of the space between the building line and the curb.

"2nd. They are directly interested in it by reason of the implied contractual relation in law, by reason of their having to pay two-thirds of the assessed valuation of the paving."

The above conclusion of law brings up in our mind the only question in the case, that is, whether the abutting property owners have a right to maintain their bill or not, the entire paving and curbing proposed to be laid being within the forty (40) foot roadway.

If the only question involved in this case was the compliance of the defendant, the contractor, with the ordinance under which he was constructing the paving in question it is clear plaintiffs would have no standing to ask the intervention of a court of equity. With the consent of the municipality the defendant company could construct the paving on the lines of the streets without compensation to abutting property owners, and such construction, not being an additional servitude on land already dedicated to street purposes, is not the taking of private property within the meaning of the rule which entitled a person who has sustained special injury to seek redress in equity. There is no question but that the borough had the right to intervene and seek redress in a court of equity for the illegal excavating of the ground or land not included in the ordinance passed for the paving and curbing of the said street and also that the ordinance did not give the right to excavate, pave and curb that portion of the ground described in the bill, not included in the ordinance, and that the attempt to do so by so taking in the said ground for paving purposes is such an invasion of the property rights of plaintiffs, without lawful authority, as equity will enjoin.

A grant of a right by a municipality to construct a street railway on certain streets, necessarily implies the construction of such switches, curves, crossovers and turnouts as may be necessary for the operation of the road. The municipal authorities can legally grant the right to construct a street railway even on the paving line and abutting property owners could not seek redress in a court of equity.

This case is entirely different and we hold that plaintiffs have a status in a court of equity.

The defendant, the contractor, having exceeded the authority granted by the ordinance in constructing the paving and curbing the said street, the preliminary injunction is made perpetual and the defendant, his servants, workmen and employees, are perpetually enjoined and restrained from erecting, setting up or maintaining the curbing and street paving on the west side of North Second Street, west of the line fixed by the ordinance and on the east side of said street, east of the line fixed by the said ordinance.

An exception is noted and bill sealed for the defendant.

Trittler et ux. vs. Borough of St. Clair.

Sidewalks—Negligence--Damages.

The question of contributory negligence was properly submitted to the jury in a case where a woman proceeded "very carefully" over a boardwalk, part of which she knew was in bad condition, even though there were a better walk on the other side of the street.

C. P. Allegheny Co., No. 314 August Term, 1911.

W. C. McClure, for plaintiffs.

C. T. Moore, for defendant.

Opinion by Cohen, J., May 12, 1913:

The evident proximate cause of the injury was the existence of a defective board in the boardwalk on the west side of Sterling Street in the Borough of St. Clair, as shown by the Statement.

Plaintiff, Anna Trittler, a married woman, who had lived on the west side of said Sterling Street ten or twelve years previous to the accident, as she testified, on December 20, 1910, at about 9 o'clock A. M., after traveling thirty feet distant from her home along the boardwalk, approached a part of the walk from which boards were and had been missing. She pro-

ceeded "very carefully" and arrived at a part of the sidewalk where no boards were missing. Continuing her way along the boardwalk, she says she made another short step to cross another "empty space that looked like there were one or two boards missing," when suddenly "that board under my foot broke and threw me forward on my face." She testified that the board in question was "good at the top" and that it was just the same as one of the good boards but underneath it was rotten. She also testified that there was a good boardwalk on the opposite side and proceeds to state as follows: "I knew the boardwalk was in that condition; I mean I knew some boards were missing, some was loose, some was rotten, and some was broke." She further stated that the board she stepped on and upon which she was hurt was "real good at the top, that is all I know about it." A couple of days "after I fell," she asserts, "I found out it was rotten underneath."

The witness Fitzsimmons stated that the boardwalk was dangerous and "you could tell that by looking," and that the roadway leading to the boardwalk across the street could not be safely used.

Another witness, Rosenfeld, swore that the boardwalk was in bad shape and dangerous and that some planks were missing and some were broken. He further testified that he would not risk going across the street to get to the boardwalk on the opposite side, and that "a good many people used that boardwalk."

Mr. Finkey testified that on this day the boardwalk in question was in bad condition, that repairs had been made upon it either before or after and that he had complained to the borough long before she was hurt.

Another witness, Groenert, said that the boardwalk in question was dangerous to cross in the dark and that he complained to Council some eight or ten months previously.

Mr. Reinhart, the street commissioner of the borough, swore that it was not necessary to repair the walk in 1909 when he left his position, because he had repaired it in 1907.

Mr. Hoffman, a witness for the defense, testified that he crossed over the roadway to the boardwalk on the opposite side, as he thought that was the better way, that it was perfectly safe so

to do, and that the boardwalk where the accident occurred was a good boardwalk from where it was torn up. "They could have come past that and got on to the good part. I walked on it," he states, "every day; so did everybody else. There was no trouble or danger to pass over the ground where the boards were torn up."

Another witness for the defense, Mr. Staab, stated that he could cross over the roadway in safety to the boardwalk on the opposite side. He further alleges that he spoke to the plaintiff and her mother, or they spoke to him, about her brother falling at this same place previously, and that she said she would sue for it. She did not say it was at the same spot where the accident in question occurred. Hence there was disputed testimony as to the roadway being passable in order to reach the boardwalk on the opposite side.

There was also disputed testimony, as will be seen, pertaining to the danger of the boardwalk upon which the accident occurred. There was positive testimony as to everybody passing over the boardwalk on which the injury took place. The question whether the danger was imminent, under the disputed testimony, was left to the jury. That she traveled over the same in open daylight and proceeded very carefully, as she stated, was also undisputed. The boardwalk on the opposite side may from the evidence, for argument's sake, be conceded to have been more safe than the boardwalk on the west side, but whether the approach thereto was safe was stoutly asserted by the defense and as vigorously disputed by the plaintiff. And even though the imminent danger had been established without contradiction, which it was not, it would still be a question for the jury, in view of the disputed evidence as to its accessibility from the residence of the plaintiff and as to its being the safer of the two routes under all the circumstances in evidence.

The latest case on the subject is the case of *McManamon vs. Hanover Twp.*, 232 Pa., 439. Mr. Justice Moschzisker, delivering the opinion of the Court, said:

"The remaining question is, Under the circumstances, could it be ruled, as a matter of law that the decedent was guilty of contributory negligence in using this unguarded path along the

edge of the cut? The path was the usual way for the people in the community to reach the houses on the embankment, and the mere fact that there was another way, or that the way chosen had points of danger which must have been known to the decedent, would not be enough necessarily to convict him of contributory negligence.

“ ‘A pedestrian in a city on a dark night well acquainted with the unsafe condition of the sidewalk, is not guilty of contributory negligence in taking it as the direct way to his home instead of some other way also unsafe, if he acted with that care with which a prudent man should act; and this is a question of fact for the jury.’ 5 Thompson on Negligence (2d ed.), 734, Sec. 6273. In *Altoona vs. Lotz*, 114 Pa., 238, the defects in the sidewalk were well known to the plaintiff at the time he was injured, and the defense was that he had failed to show a case clear of contributory negligence, it being suggested there, as it is in the present case, ‘that the plaintiff could have conveniently found a safer way’ to reach his home. We held the defense insufficient and affirmed a judgment for the plaintiff. In *Musselman vs. Hatfield Borough*, 202 Pa., 489, reversing a judgment of non-suit, we said: ‘She (the plaintiff) knew of the break on each side of the boardwalk and was watching for it, but the night being dark she did not see it, and consequently stepped outside the boardwalk and fell. There was one other way by which she could have reached her home. . . . Defendant averred contributory negligence on the part of the plaintiff, in choosing for her way home a pavement which she knew was unsafe. . . . It is often difficult to apply the law to the varying facts of the different cases and say which case is for the court and which for the jury, but here the risk was relative; whether she should in the exercise of care, have walked in the middle of the street, or have gone by the turnpike, or have walked on Market Street pavement. . . . All depended on a comparison of risks.’ ”

The Court then quoted from the opinion in *Steck vs. Allegheny City*, and further said, “From the fact that a person injured upon a defective highway was so well acquainted with its condition that he might have been able to pass over it safely by the

use of ordinary precaution, it does not necessarily follow as a matter of law that he was conclusively guilty of contributory negligence. The circumstances of the case may make this a question for the jury."

And in *Shaffer vs. Harmony Borough*, 204 Pa., 539, the Court said:

"In an action by a woman against a borough to recover damages for personal injuries suffered by reason of a defective sidewalk, it appeared that at the point where the accident occurred there was a sidewalk on but one side of the street. This walk was made partly of planks and partly of broken stones and cinders. At a place where a driveway leading to a vacant lot crossed the walk old railroad ties were laid side by side, lengthwise of the pavement and covered by fine furnace slag. For two years this part of the walk had been in a dangerous condition because of the holes in the ties caused by decay. Of this condition the borough authorities had express notice long before the accident. Plaintiff knew that there were holes in the ties, and to avoid them, she stepped on a tie some distance from a hole, which appeared to her to be perfectly sound and safe. This tie had decayed from the bottom or inside, and the heel of her shoe broke through the crust on the upper surface, and she fell and was severely injured.

"Held that the question of plaintiff's contributory negligence was for the jury, and that a verdict and judgment for plaintiff should be sustained."

Our attention is called by the defendant to the case of *Purell vs. Riebe*, 227 Pa., 503, but in that case, as is shown by the opinion of the Court, the pathway was free from obstruction and perfectly safe to walk upon. And further the Court says, "The plaintiff had a perfectly safe way to go by simply keeping off the path over the roadway on which she was walking." In the case at bar the fact of the safety of the roadway in reaching the boardwalk on the opposite side was disputed by a number of witnesses.

The material questions involved in this case constituting negligence were the subject of so much disputed testimony that it would be improper and impossible to grant judgment

non obstante veredicto. The only reasons assigned on the motion for a new trial are: that the verdict is against the weight of the evidence, and the charge of the Court, to neither of which propositions can we give our assent. The motion for new trial is therefore overruled and that for judgment non obstante veredicto hereby dismissed.

And now, to wit, May 12, 1913, motion for new trial is refused, and motion for judgment non obstante veredicto is overruled, and it is hereby ordered that upon payment of the verdict fee judgment be entered on the verdict in favor of the plaintiff and against the defendant.

Hilbert vs. New Castle Township.

Nuisance—Highways—Menace to teams.

A rope operated on a plane, making a loud noise by striking the plane above the highway, causing fright to plaintiff's horse and injuring the plaintiff, constitutes a nuisance and makes the township liable for damages.

C. P. Schuykill Co., No. 126, Nov. Term, 1911.

Burke & Burke, C. E. Berger and D. J. Ferguson, for plaintiff.

J. F. Mahoney, George M. Roads, and John F. Whalen for defendant.

Opinion by Koch, J., July 28th, 1913:

At the time of the trial the defendant's ninth point requested us to charge the jury that "under all the evidence in the case the verdict should be for the defendant," but we declined so to do. The jury found against the defendant.

The plaintiff's declaration, briefly and in effect, avers that on or about May 28, 1911, Mary Hilbert, while attending a funeral, was taken in a carriage over and along a certain public highway in said township, which highway it was the defendant's duty to keep and maintain in good, safe and passable condition, so that persons and teams going over it might

do so in safety, at or near the Ellsworth Colliery, where the defendant had, however, negligently permitted the owners or operators of the said colliery to erect, maintain and operate, a short distance above and over said highway, a plane or trestle on which coal from the mine was drawn in cars attached to a rope, and when said plane and rope were being operated the rope was raised above and then dropped again upon the plane with great force, causing a startling and affrighting noise to persons or horses upon said highway beneath or near said plane; and further: "That while said Mary Hilbert was there and then being driven on said highway near to said plane and with due care, said rope was raised as aforesaid in hoisting above the plane and then dropped upon the plane with great force suddenly and without notice to her or to the driver of said horses, making a loud noise, from which the horses took fright and ran away, throwing the plaintiff, Mary Hilbert, from the carriage," and injuring her more or less seriously.

At the trial evidence was produced by the plaintiffs in support of every averment in the declaration, and the evidence was sufficient to warrant the jury in finding that the highway is a public highway in said township, is under its supervision and is maintained by it; that it is defendant's duty to keep said highway in repair and in a reasonably safe condition for ordinary use by ordinarily quiet, well-broken, road-worthy horses; that about six years prior to the happening of the accident the owner of Ellsworth Colliery erected across the road, at a sufficient distance above it for the passage of all ordinary and usual teams and vehicles, an incline plane, which was thereafter used in hauling coal up from the mine, and that when cars were being lowered on said plane the rope, in slacking, was wont to fall on the bed of the plane and make such a noise as was calculated to frighten ordinarily quiet, well-broken, road-worthy horses; that said plane, its method of operation and its likelihood when in operation to frighten ordinarily quiet, well-broken and road-worthy horses, had existed for a space of time long enough to affect defendant township with notice thereof; that the plaintiffs were attending a funeral on June 29, 1911, and the carriage occupied by Mrs.

Hilbert and others was a hired conveyance in reasonably safe condition, drawn by ordinarily quiet, well-broken and road-worthy horses, in charge of a careful and competent driver; that said carriage was closely preceded and followed by other carriages in the funeral procession, going quietly along the road; that the driver, Mrs. Hilbert and the other occupants of said carriage were unaware of the likelihood of said plane to frighten ordinarily quiet, well-broken and road-worthy horses, and that the team was at a point on said road nearly or directly under said plane when the said rope in its slacking dropped hard on the bed of the plane, making a loud, sudden and unexpected noise which caused the team to bolt and to run away, and in so doing caused Mrs. Hilbert, through no fault of her own, the injury from which she brought this suit.

The defendant offered no evidence to show by what lawful right, if any, the plane was placed over the highway, and we told the jury that it was and is a nuisance, per se, and in effect we said that the owners of the colliery had no lawful right to erect a plane across the public highway and that the township could not escape liability, in the first instance, if parties were injured through the township's neglect to have the nuisance abated.

We think the case was for the jury and that we were correct in refusing the defendant's ninth point.

And now, July 28, 1913, the defendant's motion for judgment non obstante veredicto is overruled and judgment is directed to be entered in favor of the plaintiffs respectively upon the verdict of the jury upon payment of the jury fee.

Mertz, Christian & Co. vs. City of Reading.

Municipal Liens—Failure to file—Right to refuse sewer connections—Duress.

Where a city has lost its right to file a lien for sewer connections under the Act of 1901, P. L., 364, it may nevertheless refuse to allow connections with the sewer by owners of property who

have not paid the cost assessed. To constitute duress there must be coercion sufficient to render payment involuntary, and the threatened power must be such that the party making the payment has no other immediate or adequate relief.

C. P. Berks Co., No. 69, March Term, 1911.

Harvey F. Heinly, for plaintiff.

H. P. Keiser, City Solicitor, for defendant.

Opinion by Wagner, J., February 24th, 1913:

This suit was brought to recover back \$85.58 paid on October 20th, 1910, and \$21.42 paid on November 25th, 1910, by plaintiff to defendant, under these circumstances: City Councils, by ordinance, authorized the construction of a house sewer system and in pursuance thereto defendant laid main pipes, together with eight house connections therefrom, extending to the curb line, along premises having a frontage of about 150 feet and located on North 8th street, Reading, Pa., then owned by Christian Stoltz. At the time of the construction but one house was located thereon. When the bill for these eight connections and for the main sewer was presented to Mr. Stoltz he remonstrated against the payment of seven of these connections, for the reason that houses had not yet been erected upon the vacant lot and therefore he would not have any immediate use for them. The clerk in the City Engineer's Office then changed the bill by striking out the figure 8 and substituting the figure 1, and also reducing the bill from \$393.45 to \$260.69, the difference being the cost of the seven connections. The bill thus changed was then paid. The claim for the seven connections, not paid, was never filed in the Prothonotary's Office as a lien against the property. By a number of mesne conveyances this property became vested in the plaintiffs on July 20th, 1910. They thereupon commenced to erect upon the vacant lot ten dwelling houses. When they desired to connect with five of these unpaid house connections, to wit: with four on October 20th, 1910, and one on November 25th, 1910, the city refused permission unless the plaintiffs first paid the cost thereof. These respective sums were accordingly paid on these

respective dates and accompanying the payment the plaintiffs filed their written protest wherein they asserted the right to connect without payment, but stated that rather than suffer the inconvenience and expense that they would be put to by reason of the refusal to connect before payment, that they made payment under protest until the question, whether they were obligated to pay for the cost of these connections, could be otherwise legally adjudicated, and then to endeavor to recover the same back from the city.

It is clear that under the Act of June 4, 1901, (P. L. 364, sec. 10), this claim, not having been filed against the property within six months after the completion of the improvement, was thereupon wholly lost. That is, the claim was no longer a lien or claim against the property: *City of Scranton v. George C. Genet, et al.*, 232 Pa. St. 272, 274. Also that originally the only action therefor could have been one in rem against the land and the city could not recover in an action of assumpsit: *Philadelphia, to use, v. Bradfield*, 159 Pa. St. 517. But whilst this claim could not be recovered by the city by an action in rem, by reason of failure to file a lien, or by a personal action, yet we do not consider that the city was obligated to allow the use of these house sewer connections without payment therefor. That is, for the purpose of this case, the only effect of the failure to file the lien within six months after the completion of the work was that the city lost its right of action for the cost thereof, which it otherwise could have had even if the property owner had not used these connections. The connections were the property of the city; had not been paid for and were not indispensable to the use and enjoyment of the houses in course of erection at the time demand was made for their use. The city had not passed any ordinance compelling their use and the purpose for which same were to be used could have been supplied by wells. In the case of *Craven v. Harsh*, 186 Pa. St. 132, Mr. Justice Mitchell, on page 136 says: "In *City of Philadelphia v. Cooke*, 30 Pa. 56, it was held that the discharge of a municipal lien for water pipe by a sheriff's sale would not prevent the city from refusing to furnish water to the premises until the claim was paid, as there had been no actual

payment of the debt." We therefore consider that the city had the right to refuse to plaintiffs the use of these connections until actual payment for them had been made.

The determination of this case does not, however, solely rest upon whether or not the plaintiffs had the right to make these connections without having first paid for them. One of the essential elements to recover back money upon the ground of having been involuntarily paid is thus stated in *Union Insurance Co. v. The City of Allegheny*, 101 Pa. St. 250, on page 256: "3. The payment by the plaintiff must have been made upon compulsion to prevent the immediate seizure of his goods or the arrest of the person and not voluntarily. 'Unless these conditions concur, payment under protest will not give a right of recovery.' " The fact that this payment may have been made under protest does not help the present case. In *Lowenstein v. Bache*, 41 Pa. Sup. Ct. 552, on page 557, we have: "The only effect of a protest is to show the involuntary character of a payment procured by duress, and the intention to reclaim the money. There must be compulsion, actual, present and potential, inducing the payment by force of conditions which render the person or property subject to the control of the party demanding payment, when the party so paying may give notice of the illegality of the demand, his involuntary payment and intention to reclaim. When the element of coercion is lacking, a mere protest or notice will not change the character of the payment or confer of itself a right to recover, although it may be necessary in some cases. where the element of coercion is present, to pay under protest, that is, with notice of an intention to reclaim, in order to repel the implication of an assent: *Peebles v. Pittsburg*, 101 Pa. 304; *Borough of Allentown v. Saeger*, 20 Pa. 421; *McCrickart v. Pittsburg*, 68 Pa. 133; *Harvey v. Girard National Bank*, 119 Pa. 212; *De la Cuesta v. Insurance Company*, 136 Pa. 62."

The plaintiffs, however, contend that this claim was paid under duress. In *Lowenstein v. Bache*, *supra*, on page 558, what constitutes duress or coercion is thus stated: "To constitute the coercion which the law will recognize as sufficient

to render a payment involuntary there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting payment, from which the party making the payment has no other means of immediate and adequate relief. The threat of a distress for rent, when there is no rent due, is not such duress, because the party may replevy the goods distrained, and try the question of liability at law. The threat of legal process is not such duress, for the party may plead and make proof, and show that he is not liable. But when there is neither suit nor legal process of any kind, and the goods of a party are unlawfully detained until he pays a sum illegally demanded, he may pay under protest and maintain an action to recover the money. The general rule may be thus stated: When a party is compelled by duress of his person, deeds, papers, or personal property and the evidence of title thereto, to pay money illegally demanded, from which the party making the payment has no other means of immediate and adequate relief, it is not voluntary but compulsory; and he may rescue himself from such duress by payment of the money under protest, and afterwards on proof of the fact recover it back: *Hospital v. Philadelphia County*, 24 Pa. 229; *White v. Heylman*, 34 Pa. 142; *Motz v. Mitchell*, 91 Pa. 114; *Lehigh Coal & Navigation Co. v. Brown*, 100 Pa. 338; *Union Insurance Co. v. City of Allegheny*, 101 Pa. 250; *Shaw v. City of Allegheny*, 115 Pa. 46; *Railroad Co. v. Commissioners*, 98 U. S. 541; *Harmony v. Bingham*, 2 Kernan, 99; *Stenton v. Jerome et al.*, 54 N. Y. 480."

The circumstances attending the payment are thus stated by one of the plaintiffs, Mr. John F. Christman. He testified that he made application to the City Engineer for authority to connect; that the City Engineer, Mr. Ulrich, said that these connections could not be made without his getting a clearing slip, which he refused to issue until these bills were paid. In answer to the question by plaintiff's counsel: "Did you object to the payment of these bills that were rendered you by the city authorities, by the City Engineer's office." He answered, "Yes, sir. I went and handed them my check and also my letters of protest; that is all." (N. of T., pages 18 and 19):

This, together with the inconvenience or expense that the plaintiffs might have been put to by reason of the refusal of the city to allow the connections before payment of the bills, is not such duress or coercion as would constitute them involuntary payments. The case of *City of Philadelphia v. Cooke*, supra, is very similar to the one under consideration. In that case a lien had been laid for claims for water pipes. This lien was discharged by sheriff's sale and the city failed to collect the claim from the proceeds thereof. The city authorities refused to allow the water connections without payment first having been made. The court there held that such refusal or threat, if such it could be called, did not constitute duress and that the city had a right to impose terms upon this grant of water privileges and that the payment under those conditions was a voluntary one. Even if we take plaintiff's view of the case, that they had a right to connect, we have here nothing but the denial by defendant of a right. In *De la Cuesta v. Insurance Co.*, supra, we have, on page 82: "It is a duress either of person or goods that constitutes the coercion. It is not pretended there was a duress of person, nor was there anything to show duress of goods. There was nothing but the denial of a right, and a declared intention not to recognize a right is not duress. It is true, the denial of the right placed the plaintiff in a 'dilemma,' to use the expression of Judge Hare in *Dawson's* case. But if we adopt the principle that whenever a man is placed in a position in which the law is doubtful and he is compelled to choose between two paths, in other words, to decide between conflicting views of the law, he is to be considered as under duress, we shall certainly multiply litigation, even if no other end is accomplished." Under the facts of this case and the law governing them, we consider that the payments made by plaintiffs to defendant were purely voluntary ones for which they cannot therefore recover: *Schoenfeld v. City of Bradford*, 16 Sup. Ct. 165; *Easton Power Co. v. Ry. Supply Co.* 22 Sup. Ct. 538, 545; *Bobst v. Gring*, 32 Sup. Ct. 541; *Shenango F. Co. v. Fairfield Twp.*, 229 Pa. 357. We consider that in directing a verdict for the plaintiffs we erred and that the defendant's request for binding instructions should have been affirmed. Rule for judgment n. o. v. is made absolute.

Lehigh Valley Railroad Co. vs. Hart.**Taxation—Railroad property—Restaurant.**

The restaurant of a railroad company which forms an essential part of its station and is not directly accessible from the street is not liable to local taxation.

C. P. Luzerne Co., No. 4, in equity, May Term, 1911.

Wheaton, Darling & Woodward, for plaintiff.

C. F. McHugh, for defendant.

Opinion by Fuller, J.:

This bill seeks to restrain collection of local taxes assessed upon the portion of plaintiff's railroad station at Wilkes-Barre, in this county, used as a restaurant for railroad patronage, averring exemption from such taxes on the ground that the plaintiff, a public service corporation, pays state tax on its corporate stock and that the restaurant is an integral part of the station itself, essential to the enjoyment and exercise of the corporate franchises.

The answer admits that the right of exemption and injunction would exist if the restaurant were thus essential, which it denies.

The only question involved, therefore, is one of mixed law and fact, viz., whether the restaurant is essential, by a reasonable interpretation of that term, to the enjoyment and exercise of the plaintiff's franchise as a public service corporation.

From proofs and admissions we find the following facts:

1. The plaintiff is a railroad corporation created under the laws of this state, engaged in the business of a public carrier, transporting passengers and freight, and paying state tax upon its capital stock.

2. The defendant, Hart, in the capacity of treasurer and receiver, is the collector of taxes for the City of Wilkes-Barre, the City of Wilkes-Barre School District, the Central Poor District of Luzerne County and the County of Luzerne.

3. The plaintiff owns and maintains a passenger station within its right of way in the 8th ward of said city, used for

the convenience of persons traveling upon its railroad, comprising in a single building, under the same roof, ticket offices for the sale of tickets to those persons, baggage rooms for their baggage, waiting rooms, offices for the railroad employees, toilet rooms, newspaper-stand, telephone booths, restaurant and other accessories necessary, convenient and customary for the traveling public.

4. The said restaurant is in a reasonable sense an integral and essential part of said station; an usual adjunct of railroad passenger stations similarly situated; conducted by the plaintiff not for profit nor with a liquor license, but solely for the purpose of furnishing food to supply the needs of the traveling public; not accessible by direct entrance from the public street, but only from the railroad side of the station or from the waiting room within.

Two other railroad companies, viz., the Delaware & Hudson and the Pennsylvania, use for their passengers the same station under contract with the plaintiff.

Very little patronage, if any, comes, and none is invited, to the said restaurant from persons other than railroad travelers and employees, and about 75 per cent. of the entire patronage is derived from persons using the plaintiff's trains.

5. The portion of said station thus used as a restaurant has been assessed, against the plaintiff's protest, in the years 1908, 1909 and 1910, for city, school, poor and county taxes, amounting in the aggregate to \$753.33, and appeals therefrom have been taken by the plaintiff but dismissed, although during a prior period of many years, ever since the erection of the station, no assessment had been made of the said restaurant, and although the plaintiff, as aforesaid, pays state tax upon its capital stock.

6. The defendant now threatens and intends, if not enjoined, to proceed for the collection of said taxes by levy and sale of personal property upon the premises.

DISCUSSION.

The learned counsel for defendant concedes that his position is not expressly sustained in any decided case which he has been

able to discover, and that it is contrary to general custom in the other counties of this Commonwealth as well as in this county prior to 1908; but he stands upon a rigid application of the principle propounded in the long line of Pennsylvania decisions on this subject, viz., that property must be essential to the exercise of the corporate franchise in order to be exempt from local taxation.

That principle is defined for railroad companies in the case of *Northampton County v. Lehigh Coal and Navigation Co.*, 75 Pa. 461, in the statement that the legislation taxing real estate "does not comprehend the track, depot, water station and other necessary parts of a railroad which in fact form part of the railroad itself, and without which its duties to the public could not be performed. . . . Land necessary to the franchise of a railroad corporation is a part of such franchise and not real estate subject to taxation under existing laws;" and in the case of *Railroad Co. v. Venango County*, 183 Pa. 618, in the statement that liability to local taxation must depend upon an answer to the question whether the property is reasonably necessary to the successful prosecution of the business, and that the matter of necessity must be reasonably regarded with reference to the purposes for which the corporation was organized.

In the case of *Delaware, Lackawanna & Western R. R. Co. v. Metzgar*, 28 Pa. Superior Ct. 239, a railroad company was held liable to local taxation on its ice plant for storing ice harvested on the company's land, to be used for refrigerator cars and coolers in passenger cars, and the Superior Court, in announcing this decision, said that the arguments advanced in favor of exemption "could be urged with equal force in the case of restaurants along its line for the convenience to passengers," etc., thus suggesting a doubt on the point involved in this case, but not deciding the matter.

In the case of *In re United Jersey Railroad and Canal Co.*, 68 Atl. Repr. 167, it was held that the restaurant portion of a terminal station, entered from the waiting room, operated by the railroad company, and principally used by railroad passengers, was like the waiting rooms, toilet rooms and barber shop, reasonably necessary to the comfort of the passengers and

should be assessed, as proper appendages of the terminal station, as property used for railroad purposes, by the state board of assessors and not by the local authorities.

A similar position was taken in the case of *Chicago, Milwaukee & St. Paul Ry. Co. v. Board of Supervisors*, 48 Wis. 666 (5 N. W. Repr. 3).

The real difficulty in cases of this character does not lie so much in determining the law as the fact concerning the real relationship of the restaurant to the other property, and, if we have correctly stated that relationship in our third and fourth conclusions of fact, the claimed exemption of the restaurant naturally follows as a conclusion of law.

As a matter of absolute necessity, railroad companies could dispense with shops to repair their rolling stock and with station buildings to accommodate their traveling patrons. The repairs could be performed elsewhere; the passengers might stand around without a place to sit, and they might pay their fare upon the train, thus dispensing with waiting rooms and ticket offices; but, nevertheless, all of these facilities and accommodations have been deemed necessary in a reasonable sense, and we discover no good reason why the restaurant in this case should not be embraced in the same category.

Furthermore, while the divisibility of the same property, with separation of the taxable from the exempt portion, has been frequently recognized in practice and by authority, we do not see how, with any approach to certainty, a fragment of a railroad right of way and railroad station embraced within the same can be detached for assessment from the remainder, because the situation of such a fragment precludes that comparison with neighboring property which furnishes the rightful basis of valuation.

Be this as it may, however, we sustain on other grounds the plaintiff's contention, and find as

CONCLUSIONS OF LAW

1. The said restaurant is not liable to assessment for local taxation.
2. The injunction should be made perpetual restraining the collection of said taxes.

Commonwealth vs. O'Brien.**Boroughs—Councilmen—Changes of residence.**

Temporary removal from one ward to another while repairs are being made, combined with the fact that the defendant never in fact did change his residence, does not constitute a sufficient basis on which to oust a member of borough council by quo warranto.

C. P. Luzerne Co., No. 643, February Term, 1913.

J. T. Lenahan, M. F. McDonald, R. B. Sheridan, for commonwealth.

T. F. Farrell, for defendant.

Opinion by Garman, J., September 16th, 1913:

The petition for a writ of quo warranto sets forth, that the respondent, Michael J. O'Brien, was, in November, 1911, elected to the council of Miners Mills borough, from the second ward, and took his seat in said council on January 1, 1912; that in October, 1912, he moved out of the second ward into the first ward to No. 30 Washington avenue, where he has resided up to the time of the filing of the petition; that O'Brien's removal from the second ward to the first ward caused a vacancy in the office of councilman in said second ward; and that O'Brien, after his removal from the ward, without authority of law, continued to act in the town council of Miners Mills, as councilman for said second ward.

Upon this petition a writ of quo warranto was issued January 20, 1913.

On February 3, 1913, the respondent filed answer to said petition, setting forth that he was elected and took his seat in the said council; that he then resided and has since continuously resided in the said second ward, and did not remove therefrom at any time; that in October, 1912, having in contemplation repairs to his home, he went to his wife's mother's home to stay temporarily while the repairs were being made; that he owns his home in the second ward and left there the furnishings; that

he never had any intention of changing his residence and did not do so; that he returned to his house on January 19, 1913, before the petition for quo warranto was filed; that he voted in November, 1912, in the second ward, and that before he went to his mother-in-law's home, he consulted the borough solicitor and was advised that such temporary stay at the mother's home would not affect respondent's title to the office of councilman from the second ward.

On February 15, 1913, the petitioner filed a replication and claiming that an issue of fact was raised by the pleadings demanded a trial by jury.

Between the petition and the answer, there are only two matters of variance. The first is as to whether the petitioner represents the citizens or merely himself, and this is immaterial; the second is as to the respondent's removal from the ward.

The respondent shows that he left his house in the second ward furnished and went to live with his mother-in-law, who had a more comfortable place, and that he voted in the ward of his original residence and claimed his seat as a councilman. The petitioner shows that respondent lived in the first ward but does not disprove the facts alleged by the respondent.

The pleadings raise no issue of fact that would justify sending the case to a jury.

Nothing has been shown by the depositions which would clearly establish that respondent intended to change his legal residence.

We therefore deny the request for an issue.

We find the following facts:

(1) That the respondent, Michael J. O'Brien, was on November 6, 1911, elected town councilman of the second ward of Miners Mills borough and took his official seat on January 1, 1912.

(2) That at the time of his election, November 6, 1911, he was a resident of said second ward and has continuously resided there ever since.

(3) That in October, 1912, leaving in his residence nearly all his household goods, he went temporarily to live in the first ward at the house of his mother-in-law where he remained until

January 19, 1913, at which latter date he returned to his own home.

(4) That the respondent always claimed a residence in the second ward, exercising there his rights as a voter and a councilman.

(5) That Michael J. O'Brien in so far as this case shows is entitled to act as councilman of the second ward of Miners Mills borough.

We find the following conclusions of law:

(1) That Michael J. O'Brien's legal residence is and has been continuously since November 6, 1911, in the second ward of Miners Mills.

(2) That Michael J. O'Brien is legally entitled to fill the office of councilman in the second ward of Miners Mills borough.

We therefore direct the attorneys for respondent to prepare a decree in accordance with these findings of fact and law.

Lehman vs. Roulette Township.

Municipal Law—Negligence—Horse Racing.

A township is not liable in an action for damages for personal injuries by the neglect of its constables in permitting horse-racing, although such racing is a common nuisance under Acts of February 17, 1820, 7 Sm. Laws, 244, amended by the Act of June 11, 1891, P. L. 298.

C. P. Potter Co., No. 110, March T., 1911.

Swetland & Van DeBee, for plaintiff.

W. F. DuBois, for defendant.

Opinion by Ormerod, P. J., Sept. 3, 1912:

This case comes up upon the motion on the part of the defendant for judgment non obstante veredicto.

The plaintiff was injured by being run into and knocked down by a horse engaged in racing with other horses on the public highway in the defendant township on July 4, 1910.

The jury have found by their verdict that the supervisors of Roulette Township had notice of the intention to race, and that the plaintiff was not guilty of contributory negligence.

The sole question to be determined is the liability of the township, based upon the alleged negligence of the supervisors, permitting the races to occur.

By the provisions of the Act of June 11, 1891, P. L. 298, the provisions of the Act of Feb. 17, 1820, 7 Sm. Laws, 244, were not to apply to horses used in racing by regular incorporated societies.

It is not pretended that the race on July 4, 1910, that resulted in the injury of the plaintiff, was held by a regular incorporated society. It necessarily follows that they were in violation of law and, under the provisions of the statute, a common nuisance.

That it was not the duty of the supervisors to prevent the racing is clearly determined in the case of *Norristown Borough v. Fitzpatrick*, 94 Pa. 121. That case was brought by the plaintiff against the borough of Norristown to recover damages caused to the plaintiff by explosion of a cannon in the public street in the full knowledge of police officers, after repeated discharging of the cannon continuing throughout the day. Mr. Justice Gordon, in delivering the opinion of the Supreme Court, on page 124, says: "The injury to the plaintiff, complained of in this suit, was occasioned by the firing of a cannon in the public street of Norristown by an assemblage of citizens on the evening of Dec. 31, 1875. The business in which they were thus employed was undoubtedly of an unlawful character, and each and every person therein engaged was personally liable for any damages resulting therefrom. But that the municipality was so liable is another and a very different question. Municipalities are not conservators of the public peace; they may or may not have the power to appoint officers; but if they have such power, and do make such appointments, the powers of the officers so appointed are derived, not from municipal ordinances, but from the common law and acts of assembly. Admitting that such a mob is a nuisance and that of the worst kind, nevertheless, it is one that a municipal corporation cannot abate by the use of ordinary appliances, such as suffice for the removal of natural or material obstructions in or near a

highway. Resort must, therefore, be had to the police force; but, as we have already seen, for the doing or misdoings of those who compose this force, the municipality is not liable. The difference between those cases in which cities, boroughs and townships have been held responsible for neglect and the one in hand is very wide. The maintenance and repair of highways, sewers, wharves, etc., belong to their immediate jurisdiction, and over them they alone have control, hence their responsibility. But the conservation of the peace is a great public duty, put by the Commonwealth into the hands of public officers: the judges, justices of the peace and mayors, the governors, sheriffs, constables, policemen; hence, cities and boroughs can no more be charged with damages resulting from their misconduct than can counties, townships or state at large."

Under the authority of the case above cited, the offence of horse-racing being a misdemeanor, it was the duty of the constables of Roulette Township to arrest the parties participating therein, and the injury that was caused the plaintiff in this case was not because of any neglect of duty on the part of the supervisors, but the neglect of the duty of the constables in permitting the races to occur, and for the neglect of duty by the constables the township is not liable.

Our attention has not been called by counsel for the plaintiff to any case that sustains the allegation that the township is liable for the failure of the supervisors to prevent any violation of the law.

After careful consideration of the question involved, we are satisfied that the request on the part of counsel for defendant for binding instructions in favor of defendant should have been allowed, and that judgment non obstante veredicto should now be entered in favor of the defendant.

And now, Sept. 3, 1912, exception is allowed to the plaintiff to the action of the court in entering judgment non obstante veredicto, and at the request of counsel for the plaintiff a bill is sealed.

Miller vs. Borough of West View.**Boroughs—Contracts—Ordinances, Necessity of.**

An engineer doing extra work for a borough in compliance with a resolution of Council is not entitled to recover for his services for such extra work if no ordinance was passed and approved directing the work to be done.

C. P. Allegheny Co., No. 894, April Term, 1911.

Robb & Miller, for plaintiff.

Johnston & Johnston, for defendant.

Opinion by Macfarlane, J., April 29, 1913:

Plaintiff's written agreement with the borough, regularly executed, recited their proposition to do routine work for \$200 per year; for disposal plant $2\frac{1}{4}$ per cent. of cost; "for any other construction work two and one-fourth ($2\frac{1}{4}$) per cent. for plans and specifications," etc., and the agreement witnessed: "That the parties of the second part hereby agree to do whatever work may be ordered of them by the party of the first part upon the terms set forth in the said written proposition." They were to file an additional bond in the event of any construction work being done. The borough agreed to pay them for their services as engineers in accordance with the terms of the proposal.

On May 5, 1910, a resolution was passed by council but not presented to nor signed by the burgess, that "the engineers be instructed to prepare survey plans and estimates of the proposed thoroughfare through the borough." No other resolution or ordinance was ever passed with reference to the proposed thoroughfare, and it did not appear on any plan adopted by the borough.

On the borough plan a part of the proposed thoroughfare was a public street, a part of which was sixty feet wide and a part of less width, and through the center there was a strip of twenty-four feet the title to which was in a street railway company. To carry to completion the proposed thoroughfare involved condemnation proceedings and the acquisition of the railway company's title or the making of an agreement with the company.

At a number of meetings at which a quorum was present the character of the proposed highway was discussed and instructions were given to the plaintiffs to follow the route of the street railway and to survey and make plans for a sixty-foot highway, and they were directed to act upon instructions of the street committee, a majority of councils agreeing, but no formal action was taken and no record made in the minutes.

After a survey, plans, profiles, specifications and estimates of the probable cost of the work were made and delivered to the borough, nothing further was done towards carrying out the project. Two payments were made aggregating \$2,700, and the verdict was for the balance of the claim.

The act of May 23, 1893 (P. L. 113, Purdon 511) requires that "every ordinance and resolution which shall be passed by said council shall be presented to the chief burgess of such borough" for his approval or veto. The language is broad and includes every resolution of a legislative character but does not apply to ministerial acts in carrying on the routine business, nor to acts which merely carry into effect what has before been authorized." *Jones vs. Schuylkill Co.*, 202 Pa., 164.

"A resolution is but another name for an ordinance and if it be a legislative act it is immaterial whether it be called a resolution or an ordinance," *Howard vs. Borough*, 181 Pa., 191.

The resolution of May 5th was legislative. It related to a contract for a proposed borough improvement and was preliminary to a location, widening and grading of a street and to the construction of bridges. The contract itself recognized that construction work is not routine. It merely fixed the rate of compensation if the borough by proper action should order work relating to construction. The resolution called for the expenditure by the borough of over \$4,800 to the engineers and the "construction work" in contemplation would have cost over \$215,000.

The resolution was not a mere "carrying into effect what had before been authorized." The agreement to do whatever work may be ordered did not give authority to employ the plaintiffs to do anything in connection with construction work. The resolution was an "attempt at original municipal action,"

Long vs. Lemoyne Borough, 222 Pa., 311. As was said in Jones vs. Schuylkill Co., supra, "Generally under the first" (acts of a legislative character) "are permanent regulations for the government of the borough, the granting of privileges to occupy streets, and the creation of liability by contract." This was a creation of liability by contract. It required more than executive action to carry the part of the agreement relating to construction work into effect.

The payments do not constitute a ratification "because there was no contract to ratify," Milford Borough vs. Water Co., 124 Pa., 610. A municipal corporation can only be bound by a contract authorized by an ordinance duly passed, Ibid.

Another claim was for work in connection with a sewage disposal plant. A resolution authorized the clerk to advertise for bids, "bidders to consult Trimble and Miller for data. The right to reject any or all bids reserved." All bids were thrown out and the clerk directed to ask for new bids. The plaintiffs were directed to submit these plans and specifications to bidders and did so and gave data to them. They also furnished sets of blueprints to the borough. Testimony was given that the amounts claimed were fair. No bids were accepted. There was an original authorization for the work in the disposal plant and on breach of contract a liability.

There was grave doubt at the trial whether there was a liability on the principal claim, but it seemed best to have the facts determined by the jury.

OPINION ON MOTION FOR NEW TRIAL.

A new trial would be necessary and should be granted, but it is unnecessary as in addition to the motion for judgment n. o. v. under the act of 1905 there was a substantial reservation in the charge.

Drukemiller vs. Borough of Sunbury.**Boroughs—Dedication—Acceptance.**

A declaration of intention to dedicate, followed by removal of fences and laying of boardwalk, constitutes a covenant to dedicate to the public; and when the present owner continue the same conditions, he is concluded by his acquiescence and the dedication is complete on his part. Acceptance by the public, while necessary, need not be immediate or by the municipal authorities.

C. P. Northumberland Co., No. 351 in Equity.

George B. Reimensnyder, for plaintiff.

J. P. Carpenter, for defendant.

Opinion by Cummings, J., February 13th, 1913:

The questions of law arising out of the facts of this case are as follows:

First. Was there a dedication of the land in dispute for public use by Ira T. Clement, the former owner?

Second. If so, was there an acceptance of such dedication on the part of the Borough of Sunbury?

Third. If there was such dedication and acceptance, is the same binding on W. H. Druckemiller, the plaintiff and present owner, he claiming to be an innocent purchaser for value without knowledge of such dedication?

Dedication is a matter of intention. An owner can by his own acts dedicate to the public inherent rights, which the public may exercise without imposing any duties on the public.

That there was a dedication on the part of Ira T. Clement of the strip of land in question was proven to the entire satisfaction of the court. A dedication is to be determined from the declarations of the owner; from his acts; and by the acts of the public as invited and permitted by the owner.

There is no question but that Ira T. Clement, the former owner, made declaration of his intention to dedicate the five foot strip of ground in question, and, following up these declar-

ations, he withdrew or caused to be withdrawn, the fences from the eastern line of the thirty-three foot strip to a point five feet eastward therefrom, and established a new line five feet eastward from the old line; that upon request being made on the part of the municipality he laid, or caused to be laid, a boardwalk within the limits of the five feet thrown open by him for the use of the general public, and that the general public used the boardwalk and land in dispute from that time down to and including the present time. This, no doubt, constitutes such a dedication and covenant to and with the public as bound the owner and proprietor of the adjoining lands.

Second. It is true that acceptance by the public is necessary to fix the right. But it is not necessary that this should be by municipal authorities, or that it should be immediate: *Commonwealth v. Alberger*, 1st Whart. 469; *Commonwealth v. Moorehead*, 118 Pa. 344.

Acceptance by the municipal authorities is only necessary to make the municipality responsible for the care of the property. But this need not be by formal ordinance. Any exercise of authority is sufficient: *Philadelphia v. Thomas*, 152 Pa. 494. In this case it was shown that the public had used the land in dispute as a public thoroughfare or sidewalk from the time of its dedication in 1895 to the present time.

The Borough of East Sunbury exercised authority over the said strip of land by excavating the same and hauling away the ground in 1895. While there may have been no formal acceptance on the part of the borough until 1912, the borough of Sunbury did, at that time, to wit, February 10, 1912, regularly and legally pass a resolution of acceptance of said strip of land and had the same regularly recorded upon the records of Sunbury Borough. The said resolution was duly advertised, regularly passed and was approved by the chief burgess. The resolution, above referred to, was treated by the municipality as an ordinance.

Even though there might not have been a formal acceptance on the part of the borough, prior to the passing of the resolution or ordinance in February, 1912, the borough was unlimited in the time given by law in which to accept the dedica-

tion. "Acceptance by the public need not be immediate, but may be made when public necessity or convenience arises." *Pittsburgh v. Epping-Carpenter Co.*, 194 Pa. 318, 328.

We therefore find, as a matter of law, that there was a valid dedication of the land in dispute to and for public use. When such dedication has been perfected, like any other executed gift, it became irrevocable: 3rd Washburn on Real Property, 72.

As was said in the case of *Commonwealth v. Llewellyn*, 14 Super. Ct. 214, 220: "When the evidence clearly indicates the owner's desire to surrender control and donate a right of way to the exclusive use of the public, and the public so accept and use it, it is an acceptance of the right of way as of the width dedicated and actually opened for public travel."

Again, Mr. Justice Mitchell, in the case of *Bornot v. Bon-schur*, 202 Pa., on page 469, says: "When Estlack in 1829 drew back his property line six feet from the then established north line of Chestnut Street, he dedicated or in his own words 'threw out' that space for the public use as a part of Chestnut Street and it came under the jurisdiction of councils for all future uses, public or otherwise as they might determine."

To the same effect is the doctrine as reiterated in *Waters v. Philadelphia*, 208 Pa. 189; *Forsythe v. Philadelphia*, 211 Pa. 147.

The plaintiff in this case claims he is not bound by any dedication made by Ira T. Clement, the former owner, for the reason that he had not been informed or notified of such dedication.

We do not think his contention correct, for the evidence in this case clearly shows that before he purchased, the former owner had moved his fences back five feet, built a boardwalk of the width of five feet, that it was used daily by the traveling public, thus showing it to be a public highway and dedicated to public use. *Strong, Justice, Schenley v. Com.*, 36 Pa. 59, says: "Wherever there is an actual giving of land for a public highway, accepted by the public, though there be no deed, the dedication is complete."

In this case the plaintiff after purchasing the property, continued to permit its use under the same conditions as the former owner. He is therefore estopped.

Posey vs. National Bank of Western Pennsylvania.**Sidewalks—Coal hole—Negligence—Damages.**

Where there is evidence that the plaintiff's fall through a coal hole was due to the slipping of the lid, the question of the abutter's negligence must be submitted to the jury.

C. P. Allegheny Co., No. 75, May Term, 1910.

L. B. Cook, for plaintiff.

Lazear & Blaxter, for defendant.

Opinion by Ford, J., July 31st, 1913:

This action is to recover damages for personal injuries alleged to have been suffered by the plaintiff as a result of the negligence of the defendant bank.

The defendant owned a lot or piece of ground situate on the northeast corner of Penn Avenue and Ninth Street in the City of Pittsburgh. In the sidewalk abutting on its property, the bank maintained a coal hole.

On November 5, 1909, the plaintiff alighted from a street car, which had stopped in front of the defendant's property for the discharge of passengers, and started along the sidewalk on Penn Avenue towards Ninth Street. He had proceeded a short distance when he stepped on the lid covering the coal hole. The lid tilted, one of his legs went into the hole and he was injured.

The verdict of the jury was for the plaintiff, and the defendant moves the court for judgment non obstante veredicto, assigning error in the refusal of defendant's request for binding instructions.

The coal hole was about two feet in diameter, flush with the pavement and approximately two or three feet from the curb. It was covered by a lid resting on a cast iron fringe in the pavement. The lid or cover was held in place by an iron pin passing through the center of the lid and through an iron cross bar under the pavement, against which the lid is fastened by a wing nut. In covering the coal hole the defendant used two lids; the one a grating, used in the summer; the other, a solid piece, in the winter.

In the summer of 1909 A. & S. Wilson, under contract with the defendant bank, replaced the sidewalk. The work was completed in October. During the repair A. & S. Wilson removed the lid and protected the public by erecting a framework around the walk. The work being finished, A. & S. Wilson removed the framework. The lid or cover was placed in position and the iron pin fastened to the cross bar by Mr. Hopewell, a janitor in defendant's employ.

It is not denied that the evidence was sufficient to justify the jury in finding that the plaintiff had suffered an injury by reason of the cover slipping from its bed when he stepped upon it, but the defendant contends that the facts in evidence did not justify the submission of the question of defendant's negligence to the jury.

In the case at bar, as in *Strohm vs. Haverstick*, 44 Superior Ct., 169: "The defendant thoroughly established by proof, which was not contradicted, that the coal hole maintained in the sidewalk was so constructed that if the iron covering rested where it was designed to rest on the deep shoulder or collar provided for it, no misplacement of it could happen by a foot passenger stepping upon it. The plaintiff had just as conclusively proved that he had suffered an injury, because when he stepped upon the covering it slipped away from its bed and left the hole uncovered."

It was claimed by the plaintiff at the trial, and he submitted testimony to show, that the defect in the coal hole or the fastenings existed for some time prior to the accident. Walter Mackey testified that three days prior to the accident he stepped on the cover and "it kind of tipped over."

"Q. How far did it tilt down?

"A. I couldn't tell that. It went down. I know that because I slipped. I just looked around and kept on going."

It is true that the recollection of the witness as to the date is not clear. On cross-examination he fixed the date as in November "about the middle of the month" and he "couldn't remember the date." The credibility of the witness and the weight to be given his testimony was for the jury.

It does not definitely appear when the coal hole was re-

covered after the removal of the lid by A. & S. Wilson. Mr. Hopewell testified that the lid was replaced in the month of October "prior to the first of November."

That the repairs to the sidewalk had been completed and the lid placed in position within a short time prior to the accident may be fairly inferred from the evidence. It was the duty of the defendant to see that the cover or lid was securely bolted to the cross bar, so bolted that the cover could not have tilted. Mr. Hopewell testified:

"Q. If that nut was tight, could that coal hole cover move?

"A. No, sir; it was impossible."

As was said by Justice Clark in *Dickson vs. Hollister*, 123 Pa., 421, "It was his (the owner's) duty to exercise reasonable care and diligence not only in making but in keeping it (the sidewalk) safe and secure. He was bound to know that persons would pass and re-pass on this pavement not only in the daytime, but in the nighttime also. . . . It is quite certain that the cover was not secure or it would not have turned, and the jury has found that its insecure condition was owing to the defendant's want of diligence and care concerning it." *McLaughlin vs. Kelly*, 230 Pa., 255.

The question of defendant's negligence was not free from doubt, but from the evidence the jury might fairly and reasonably infer that the instrumentalities covering the coal hole were defective, the nut loose, not tightened against the cross bar, and the lid therefore in a condition dangerous to persons using the sidewalk in the ordinary way.

We are of opinion that the point for binding instructions was properly denied.

The defendant also moves for a new trial, alleging that:

1. The court erred in refusing defendant's motion to strike out the testimony of Mackey.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is excessive.

At the close of the testimony of Walter Mackey counsel for defendant moved that his testimony—as to slipping on the lid of the coal hole—be stricken out because it was long after the accident. Considering the testimony most favorably to the

contention of the defendant, it appears that the witness made contradictory statements. On direct examination he placed the time at which he had stepped on the coal hole as three days prior to the accident in which the plaintiff was injured, and on cross-examination at a date subsequent to the accident. That he made statements which did not harmonize, would not in itself justify striking out the testimony, particularly when he repeatedly testified that he did not remember the date.

The verdict of the jury was for the plaintiff in the sum of \$2,334.35.

The plaintiff claimed he was injured in the right leg and in the back, that he suffered pain and until the trial the pain persisted, particularly during changes in the weather and when he attempted to lift a heavy load, and that as a result of his injury he will probably continue to suffer pain in the future. By occupation the plaintiff was a collector for a laundry earning an average wage of from \$25 to \$30 per week. He was confined to his home unable to work for three weeks. At the expiration of that period he engaged the service of a boy whom he paid an average of fifty cents per day. Considering the elements of damage, it seemed that the verdict is larger than is justified by the evidence.

July 31, 1913, the motion for judgment non obstante veredicto is refused and it is ordered that if the plaintiff within ten days shall file a remittance of all of said verdict over \$1,700 on condition that the same be paid within twenty days after notice of filing given to defendant's counsel, a new trial is refused; otherwise, a new trial is granted.

In Re Contested Election of Gallagher.

Boroughs—Elections—Ballots.

Where two councilmen are to be chosen for different terms and the official ballot lacks sufficient instructions, the election will be declared invalid.

Q. S. Luzerene Co., No. 395, November Sessions,

E. J. Moore, for Gallagher.

H. A. Shovlin, for Elliott.

Opinion by Strauss, J., April 29, 1913:

- At the municipal election held in November, 1911, two borough councilmen should have been voted for by the citizens of the Fifth ward of Freeland—one under the Act of June 1, 1883, P. L. 54, Section 4, to fill an unexpired term for two years, which had been temporarily filled by the council—and the other under the Act of June 19, 1911, P. L. 1047, to elect a successor to Thomas Elliott, who originally held the office for a term which expired on the first Monday of March, 1911, but which had been extended by the recent amendment to the Constitution to the first Monday of December, 1911.

At the election the ballot, as supplied by the county commissioners, was printed as follows, so far as it provided for the election of borough councilmen:

COUNCIL. (Mark Two.)		
Thomas Elliott,	Republican	
P. M. Sweeney,	Republican	
James M. Gallagher,	Democratic	
Patrick Meehan, 2 years,	Democratic	

By the returns computed and certified to the Court of Quarter Sessions, it appeared that 186 votes were cast for councilman for the term of four years; James M. Gallagher was declared by the return to have received 102 votes and Thomas Elliott 84 votes. In this contest proceeding, the examiner reports that Gallagher received 120 votes, all of which were illegal and no legal votes; that Elliott received 76 votes, all of which were illegal, and 17 legal votes; that therefore Elliott was elected a councilman for the term of four years.

In view of the conclusion now reached that the election for councilman was illegal, it will not be necessary to analyze all the findings of fact and law reported by the examiner. It is sufficient to know that the 17 legal votes counted for Elliott were ballots on which the voters had apparently written "four years" after the name of Thomas Elliott, while no voter had made any notation

of the term for which the ballot was intended to be voted in favor of Gallagher.

The reason for declaring the election void: The Act of April 14, 1897, P. L. 23, provides:

"Whenever in any contested election the tribunal trying the case shall decide that the ballots used, were, by reason of the omission, addition, misplacing, misspelling or misstatement of one or more titles of offices, or names of candidates, or parties or policies represented by them, so defective as to the office in contest as to be calculated to mislead the voter in regard to any of the candidates nominated for said office, and that the defective condition of said ballots may have affected the result of the entire election for the said office, the said tribunal shall declare the election to be invalid as regards the said office, and shall report their decision to the proper officer or officers who are now by law authorized to fill vacancies occurring in such office, who, upon receipt of such notice, shall without delay proceed to appoint a suitable person or persons to fill the vacancies thus created, and the person or persons so appointed shall continue in office until the next election succeeding his appointment at which such office is now by law required to be filled."

Commenting on this Statute in Foy's Election, 228 Pa. 19, the Supreme Court said:

"The Act carries with it the right to exercise all judicial discretion in deciding the question as to whether or not the ballots used were calculated to mislead the voters; but judicial discretion never means the arbitrary will of the judge. It is always a legal discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the Court to follow it. A Court ought always to be slow to set aside an election for any office, but when the Legislature has ordained that under a certain state of facts it shall so act and such facts plainly appear on the record, the duty is clear, and there should be no hesitation about declaring the election invalid."

Applying this to the facts here, we find that there were to be chosen at the election of 1911, one councilman for the term of four years and one for a term of two years; that is to say. the

electors were to fill the two offices by voting for one person for each office. Had the terms of both been the same no confusion could have arisen from the form of the ballot which carried the instruction "vote for two" over the names of four candidates in the councilmanic block, only one of whom had printed after his name the term for which he offered himself. As it was, the bulk of the voters marked two names indiscriminately, with the result that at least four voters voted both for Gallagher and Elliott, though the master reports that "it was generally understood that Thomas Elliott and James M. Gallagher were the opposing candidates for the four years' term." The fact that four ballots were cast which carried votes for both these candidates would indicate that notwithstanding the so-called "general understanding" there were some electors who did not have that understanding. As the ballot was printed, there was nothing to prevent both Gallagher and Elliott from obtaining a majority of all the votes that were cast at the election for councilmen, and such a result would not have violated the instructions given officially to the electors when they were directed to mark two of the four. This necessarily means any two. The fact is, the ballots should have been printed with two councilmanic blocks as follows:

COUNCIL (Four years.)		
(Mark One.)		
Thomas Elliott,	Republican	
James M. Gallagher,	Democratic	

COUNCIL (Two Years).		
(Mark One.)		
P. M. Sweeney,	Republican	
Patrick Meehan,	Democratic	

A very suggestive case is to be found in Elizabethville Borough Election, 5 D. R. 229. The people of that borough were required by law to elect seven councilmen, three for three years, two for two years, and two for one year. Nominations were made by the Republican and Democratic parties of three candidates

each for the three years' term, and these were duly certified to the county commissioners. No nominations were made and no nomination papers were filed either for the two year term or the one year term. The county commissioners supposing their duty was completely performed when they printed upon the official ballot the names of all persons who were duly nominated or in whose behalf nomination papers had been filed, printed the official ballot in this case in such manner that under the name of "councilmen" the nominees of the two parties for the three year term appeared and the councilmanic division of the ballot was headed "Council, Mark Three." At the election a very small minority of citizens wrote additional names on the ballot, designating the term with each additional name and then put the usual voting "x" in the proper place. It thus happened that out of a total of 175 votes cast, two persons appeared to be elected as councilmen for one year by 14 votes, and two persons appeared to be elected as councilmen for the two year term by 13 votes.

Judge McPherson of the Dauphin county court set aside the election with the following comment:

"We desire to say that no question is now raised with reference to the title of the three persons who were regularly nominated and received the majority of votes cast for the term of three years. . . . But it seems quite clear that the Ballot Law of 1893, P. L. 419, requires us to declare void the so-called election of the four defendants. It is to be regretted that the county commissioners in preparing the ballot did not construe Section 13 of the statute as we think it must be construed. . . . Section 13 requires the commissioners to 'ascertain the offices to be filled' and they are 'responsible for the accurate printing of the ballots in accordance with this Act.' This imposes upon them the duty of printing the ballot in such form as will allow each voter an opportunity to vote for every office which by law ought to be filled at the particular election, whether or not a candidate has been certified or named therefor. This appears also from that clause of Section 14, which provides for the blank column at the right of the ballot; for that clause expressly declares that 'there shall be left at the right of the groups of candidates for presidential electors and of the lists of candidates for other offices

(or under the title of the office itself for which an election is to be held, in case there be no candidates legally nominated therefor) as many blank spaces as there are persons to be voted for by each voter for such office, in which spaces the voter may insert the name of any person whose name is not printed on the ballot as a candidate for such office, and such insertion shall count as a vote without the cross mark hereinafter mentioned.' This clause has been recently considered by the Supreme Court in two cases; McCowin's Appeal, 165 Pa. 233, and Redman's Appeal, 173 Pa. 59. In both cases it is held, that if an elector desires to vote for any person whose name is printed on the official ballot, he can only vote by 'marking' as the Act prescribes. If he wishes to vote for any person whose name is not upon the ballot, he can only do so by inserting the name in the proper blank space prepared therefor; but he has no right to insert anything else in this space or in any other part of the right hand column. In so far as the mode of voting is thus specifically prescribed by the Act, all other modes are by necessary implication forbidden.

"It follows therefore that if seven persons are to be elected, and only three candidates are nominated, the ballot should be prepared so as to leave seven blank spaces in the appropriate division. Moreover this particular ballot should have contained in each column a direction to the voter to mark three councilmen for three years, two for two years, and two for one year, these being the terms of office specified by the Act of 1895; and if the certificates of nomination or the nomination papers did not name enough candidates for the respective terms, the commissioners should nevertheless have prepared the ballot with seven spaces and with the proper directions concerning the terms of office fixed by the statute. From the decisions named and the other considerations herein suggested, it must be held that the thirteen and fourteen votes cast by writing in the blank column the names of the defendants and the terms for which they were to serve were clearly illegal. Nothing can be written in that column except the name. The votes cast for the defendant were therefore void and should have been rejected by the election officers."

In McCowin's Appeal, 165 Pa. 233, *supra*, where in addition to a name not already on the ballot for whom the vote was cast, the

voter had also written into the right hand column the name of the office, it was held that the ballot was irregular and void because the statute authorized only the writing of the name of the person in that column, the Court declaring:

"In so far as the mode of voting is thus specifically prescribed by the Act, all other modes are by necessary implication forbidden."

And in *Redman's Appeal*, 173 Pa. 59, this principle was adhered to and again declared in the same words and it was explained that if a voter "desires to vote for any of those whose names are printed on the official ballot, he must do so by marking as directed by the ballot. If he wishes to vote for persons whose names are not already on the ballot, he can do so by inserting their names in the blank spaces prepared therefor, but he has no right to insert anything else in said blank space or in any part of the right hand column."

Later cases have not modified this ruling. *Lawlor's App.*, 180 Pa. 566; *Flynn's Election*, 181 Pa. 457; *Newberry Twp. Election*, 187 Pa. 297; *Gearhart Twp. Case*, 192 Pa. 446; *Dailey's App.*, 232 Pa. 540; *Rodgers' Election*, 234 Pa. 516.

In the light of these cases, the examiner ought not to have counted as legal the seventeen ballots cast for Elliott on which the voters had written the term.

In *Chamberlain v. Hartley*, 152 Pa. 546, the Supreme Court quoted with approval from *Cooley on Constitutional Limitations*, 253:

"In elections by ballot the voter must take care that his ballot shall be complete in itself, so that it shall express his intention without resort to extraneous evidence for explanation of apparent ambiguities. The general rules of law do not permit a written instrument to be varied or added to by parol; and in case of ballots the parol evidence would be especially objectionable and dangerous, since public interests of the highest importance depend upon the election; and the inducements to corruption and perjury would sometimes be enormous."

Summing up all the cases we may state the following as the outcome:

Under the Act of 1893, as modified in 1903, the official ballot

provided by the county commissioners must be so definite and complete in its instructions that a voter marking the ballot strictly as authorized by the statute, shall thereby clearly indicate his purpose, both as to the person for whom he desires to vote and as to the term for which he intends that person to be elected. Where the instruction printed upon the ballot "mark two" is inconsistent with the right of the voter to mark only one for a particular term of office, the ballot is misleading; and where, under the same designation of office on the ballot, names are printed without designation of term, though the law requires such designation under the circumstances of the particular election, the ballot is incomplete and misleading. It is the purpose of the ballot law that the well-informed, or the professional politician, shall have no advantage over any other citizen who depends upon the instructions printed on the ballot for information as to the manner of voting and the persons for whom, and the term for which, he is to vote. Any ballot that falls short of this and that leaves it open for extraneous evidence to establish the purpose of the voter is defective.

For these reasons the following exceptions to the examiner's report are sustained:

Ninth. That the examiner erred in his twelfth finding of fact, to wit: "That Thomas Elliott received seventeen legal votes for councilman."

Tenth. That the examiner erred in his thirteenth finding of fact "that Thomas Elliott was elected councilman for the term of four years in the Fifth ward of Freeland borough by a majority of legal votes cast at said election and is entitled to serve in that office."

Twenty-fourth. That the examiner erred in not affirming respondent's twenty-fourth point, which reads as follows: "That the failure of the official ballots to designate the term of office of Thomas Elliott and P. M. Sweeney, Republican candidates for council, and James M. Gallagher, Democratic candidate for council, was the cause of uncertainty of the marked character to the voters, as well as to the election officers in the computation of the ballots."

Now, April 29, 1913, it appearing that the official ballot used in the Fifth ward of the borough of Freeland, at the election held in November, 1911, was so defective with regard to the election of councilmen that it must have affected the result of the entire election for said office, and that it was calculated to mislead the voter in regard to candidates nominated for said office; it is now ordered, adjudged and decreed that the aforesaid election of councilmen in the Fifth ward of Freeland was invalid as regards said office for the term of four years; and it is ordered that a certificate of this decree shall forthwith be transmitted to the council of the said borough, so that they may appoint a suitable person or persons to fill the vacancies thus created, in accordance with the statute in such cases made and provided.

Irwin Transfer Company vs. Irwin Borough.

Municipalities—Negligence—Guardrails—Ice and Snow.

The question of choice of roads is for the jury and not the court; likewise whether or not the team shied or the wagon slipped for want of a guard rail.

If the accident is due to recent freezing the borough is not responsible, but the omission of a guard rail, while not a proximate cause, is a contributing cause and could have been foreseen and guarded against, and, therefore, makes the borough liable.

C. P. Westmoreland Co., No. 741 May Term, 1913.

John R. Keister, for plaintiff.

James L. Kennedy, for defendant.

Opinion by Doty, P. J., November 8th, 1913:

The pending motion is for judgment non obstante veredicto. No motion for a new trial has been filed because it seems to be conceded that the case was fairly tried and that the verdict, if there be any liability, is not excessive.

It is contended that the evidence shows that the plaintiff

under the circumstances was guilty of contributory negligence. The question, under proper instructions, was submitted to the jury. The verdict settles the question in favor of plaintiff. Nor is it by any means clear that the court should have declared as a matter of law that plaintiff was guilty of contributory negligence. It is averred that such negligence appears because the driver did not take another way to reach his destination and because the plaintiff did not notify the borough authorities of the dangerous condition and request of them the erection of a guard rail or other protection.

The jury had instruction as to the necessity of notice and that without notice the borough would not be liable. The evidence, however, clearly shows that the authorities had constructive notice. They were bound to know the conditions that had existed at the place of the accident for many years. It would be a new doctrine to declare that plaintiff was guilty of contributory negligence because he did not request a guard rail to be provided at the place of the accident. Whether the driver was negligent in traveling that street when it was obviously dangerous, as defendant contends, was for the jury. Under the circumstances it was not for the court to so declare. The street was much traveled; it was the main road to the freight station and seemed to have been generally used on the day of the accident both before and after. It was likewise for the jury to say whether the driver was negligent in not taking another route to his destination. The evidence shows some conflict about the advisability of taking the other road. It is not agreed that the other way was perfectly safe, nor that the one taken was so obviously dangerous as to deter the general public and ordinarily prudent and careful people from using it. Under such circumstances it seems to be the rule in many cases that the question of contributory negligence is for the jury.

The question of negligence on part of the borough authorities was likewise submitted to the jury. It is urged that the accident happened because in passing another team one of the horses snapped at plaintiff's horses and caused them to turn suddenly and in turning they went over the embankment. The evidence shows some conflict as to whether the horses

pulled the wagon over or the wagon dragged the horses down. The fact that there was some dispute in the testimony would be sufficient to take the matter to the jury. But whether the horse snapped or not is not a controlling matter here. Admitting that the horse of plaintiff shied by reason of the movement of another horse does not relieve the defendant from the charge of negligence in failing to erect a guard rail. The shying of a horse is such an ordinary occurrence that the borough officials should have readily foreseen it and made provision against accident on that account.

The plaintiff's version of the accident is that the wagon slipped on the ice and dragged the horses over the embankment. The defendant on this head earnestly contends that as the ice was of recent formation and there being no notice, actual or constructive, of the icy condition of the street, the borough cannot be chargeable with negligence. But it is in evidence that a member of council drove over the road immediately in front of the wagon which was wrecked and the street commissioner showed by his testimony that he had actual knowledge of the condition of the street on the morning of the accident and for several days previous. If the slippery street had caused the injury by the falling of the horses or skidding of the wagon in the absence of defect in the roadway, the defendant's contention would be fortified by abundant authority. An unbroken line of cases shows that a municipality is not liable for injuries due to the slippery condition of its streets occasioned by a recent freezing of rain or snow. Nor is it alleged that the borough was negligent in permitting the ice to accumulate on the streets of the borough. The only averment in the statement is that "the defendant was grossly negligent in leaving its road, at the place where the accident occurred, in such an unprotected condition." If the wagon had not slipped or the horses shied, whichever theory be adopted, there would have been no accident. The icy condition of the street was a contributing or concurring cause. It was no unusual thing, however, for the streets of Irwin to be in an icy condition during the winter season. This was something most likely to happen in the usual course of events and just as foreseeable as the shying of a horse at the place of the accident.

The exact point insisted on by defendant has, perhaps, not been decided in this state. At least, attention has not been called to any such adjudication. But in numerous cases can be found the principle announced which when applied here makes it reasonably clear that the court could not say as a matter of law that the absence of a guard rail was not the proximate cause of the accident. Thus in *Russell vs. Westmorland County*, 26 Sup. Court 425 it is said: "It is true there are cases in which it has been held to have been the duty of the court to declare as matter of law that the negligent omission to provide a guard rail at a point like that in question, although concurring with the fright of the horse, was not the proximate cause of the accident. Many of the cases of this class are collected in *Card vs. Columbia Twp.*, 191 Pa. 254. For the most part they were decided upon the ground that it appeared in the presentation of the plaintiff's own case that the accident was produced by an intervening or independent or unrelated cause, the happening of which the defendant could not reasonably be expected to foresee and provide against, as for example the breaking of traces, *Willis vs. Armstrong Co.*, 133 Pa. 184; *Card vs. Columbia Twp.*, 191 Pa. 254; the giving away of holdback straps, *Habecker vs. Lancaster Twp.*, 9 Pa. Sup. Ct., 553; the choking of the horse by a too small collar, *Chartiers Twp. vs. Philips*, 122 Pa. 601; or his fright from an extraordinary cause at a point distant from the place of the accident. *Schaeffer vs. Jackson Twp.*, 150 Pa. 145." Now it cannot be affirmed here in the light of the testimony or from common experience that the accident was produced by an unrelated cause, "the happening of which the defendant could not reasonably be expected to foresee and provide against." In 28 Cyc. 1410 it is stated that: "The presence of ice or snow causing an additional or contributing cause of the injury will not exempt the corporation from liability." Numerous cases are cited in support of the proposition among which is *Layman vs. City of Brooklyn*, 85 N.Y., 524, and in which the Court says: "Before the brewery wagon reached the depression which tipped it over the wheels slid several feet over the snowy surface of the street and it is therefore argued that the accident was wholly attributable to the snow,

for the presence of which the city is not responsible. As to this point, however, the most that can fairly be said is that the slippery surface formed by the snow combined with the hole in the highway to produce the injury and under such circumstances the municipality is liable inasmuch as the accident would not have occurred in the absence of the hole no matter how far the wagon wheels might have slipped over the snow. Whatever action the snow may have had as a concurrent cause, it is clear that the plaintiff's intestate would not have been killed if there had been no depression in the street top enough to upset the wagon. As has already been shown, there is evidence that this depression has been there sufficiently long to charge the city with notice and the jury were fully justified in finding that it constituted a culpable defect in the highway."

After a careful review of the whole matter, it seems clear that there was no error in submitting the questions of negligence, contributory negligence and proximate cause. The general rule is that such questions are for the jury. It is only where the facts are not in dispute or the inferences certain that the court can determine them as a matter of law. The evidence justifies the conclusion that the borough authorities were grossly negligent in failing to erect a barrier. The street was narrow; it was one of the main avenues of travel; it was constantly used in going to and from the freight station and on its side was the declivity of fifteen or twenty feet. With this view of the law and satisfied that the case was fairly tried and the verdict moderate the motion n. o. v. is denied.

And now, the motion for judgment n. o. v. is denied and upon payment of the jury fee judgment is entered on the verdict.

Brower vs. Borough of Herndon.

Boroughs—Pavements—Damages.

Where certain grading was done by the husband of the owner of the property, through ostensibly for the benefit of the borough but without any ordinance, the borough is not liable in damages to the owner of the property.

C. P. Northumberland Co., No. 75, September Term, 1908.
George B. Reimensnyder and W. J. Sanders, for plaintiff.
J. Simpson Kline, for defendant.

Opinion by Moser, J., March 31, 1913:

We do not think it was serious error to exclude the testimony of Adam Leader complained of in the plaintiff's first reason for a new trial; it was hearsay testimony and there can be no good reason why the jury should consider what Leader said, Walt said, as proposed in the offer. We do not think liability should be attached to the defendant borough in that way.

Walt is quite an elderly gentleman who for some time has been in very poor health; he was physically unable to attend the trial but subsequently his testimony was taken at his home for our consideration on this motion. He says, in substance, that he cut down the bank below the plaintiff's house, south toward the store, for the borough; that he opened up the street the same as any other place and that he cut down and leveled off for the payment of Mr. Brower, who paid for the work.

It would be impossible for Mr. Brower to get down to the grade for his pavement without cutting away the bank, and the excavating by the borough would be rather a benefit than an injury to the plaintiff. The plaintiff testifies that Walt told them they were compelled to lay a pavement. There was nothing whatever to corroborate this statement and other witnesses testified that the laying of a pavement was optional with her as with other property owners; there was nothing compulsory on the part of the borough in this respect. This conflicting testimony was passed upon by the jury and decided in favor of the defendant.

The plaintiff offered no ordinance or action of the borough council relative to the grading here in question, and under those circumstances, we doubt very much whether the declarations of Walt should bring liability home to the defendant, in the light of the doctrine laid down in *Hicks v. City of Williamsport*, 235 Pa. 509; *Kittanning Borough v. Thompson*, 211 Pa. 169; or the rule established in such cases as *Chester v. Eyre* 181 Pa. 642.

The testimony of Henry S. Byerly, complained of in the second reason, did not influence the jury one way or the other in arriving at a verdict; and we think the testimony of C. E. Adams, complained of in the third reason, was properly admitted, as the evidence from the beginning to the end of this case, discloses the fact that the plaintiff's husband was certainly exercising control of the property here in question and transacting all business pertaining thereto. We think the evidence in the fourth reason assigned was properly admitted in contradiction of the testimony of the plaintiff.

We find no errors in the remark of the court complained of in the fifth reason. We have reviewed the testimony closely and find nothing that would tend to show that Mr. Walt did work on the private property of the plaintiff as street commissioner. The testimony of the plaintiff at most, might tend to prove that by digging away the bank in the street in front of her property the borough employees injured or damaged the same. Indeed her own testimony as to Walt's removing the bank or triangle is very slight, and was only incidentally brought out on cross examination.

Walt's time book was admitted to contradict the plaintiff and we now think that she has no substantial complaint as to that phase of the case.

Since hearing the argument on the motion for a new trial in this case, we have reviewed all of the pleadings, the record and the testimony with considerable care. A deliberate consideration of the reasons given by the plaintiff has not persuaded us, by any means, that a new trial should be had.

The evidence is quite convincing that the plaintiff's husband attended to practically all business and matters concerning the property alleged to have been damaged and which he conveyed to her by deed recorded May 12, 1906. Quite a number of witnesses testified that they worked at and about this property at different times for some considerable period prior to the death of the plaintiff's husband and that they were employed by him; indeed we do not recall a single one of the many heard, who said they had been employed by the plaintiff.

So far as the testimony shows, Mr. Brower employed the

hands and directed the work in removing the trees and old buildings complained of in the plaintiff's statement. The contractor who erected the house testified that he was employed by Mr. Brower, and so with those who made the excavations for said house and for the pavement as well as the laying of the same.

In all matters of judgment or discretion Mr. Brower only was consulted and not any of the witnesses testified to any communication or consultation with the plaintiff or to having received any instructions or directions from her whatever.

The question of fact wherein the testimony was conflicting were submitted to the jury with, we think, ample instructions and the jury found in favor of the defendant.

There is in fact no testimony in this case that would warrant a verdict for the plaintiff for the old buildings and the trees claimed for in the plaintiff's statement.

There is considerable testimony to the effect, that, in excavating for the cellar of their home, the plaintiff's husband and the men working under him and with him threw the earth out on the bank in front of the house toward the street or travelled highway; that they then built a wall to protect and maintain this loose earth and put down a pavement similar to that of other property owners along the street. One of the witnesses testified that Mr. Brower ordered the flagstone for the pavement from him long before the house was built.

In order to lay a pavement it naturally became necessary to cut off the sloping bank and to excavate to the proper grade. If this was done by Mr. Brower, surely the borough should not be held liable for any injury to the plaintiff's property that might have resulted therefrom; if the property was improved and the value thereof not reduced or decreased by the removal of the bank there should have been no recovery.

These are the questions that in our opinion, went fairly to the jury and were decided in favor of the defendant and we are not disposed to interfere with their findings.

The motion for a new trial is therefore hereby overruled and an exception noted for the plaintiff.

Scott vs. Avonmore Borough.**Burgesses' records—Certiorari.**

On certiorari the transcript of the burgess should show the substance of the ordinance and the formal conviction of the particular offence complained of.

C. P. Westmoreland Co., No. 539, February Term, 1913.

R. D. Noel, for appellant.

Opinion by McConnell, J., March 22, 1913:

The plaintiff in error was arrested on a warrant issued by G. M. Fennell, Chief Burgess of Avonmore Borough. This warrant is predicated on an information charging that "at Avonmore, in the County of Westmoreland, on the 4th day of January, 1913, that T. P. Scott did violate Borough Ordinance of May 22, 1893, sec. 1 and 11, by offering and peddling grain for sale in said borough without license." The warrant specifies the charge with no greater completeness or particularity. The docket entry nowhere mentions any ordinance. A borough ordinance is not a public law that must be noticed without being substantially pleaded. There is no incorporation of the ordinance in the record even by reference. The ordinance, or the substance thereof, must be set out in the record, or it is fatally defective: *Hanover Borough v. O'Bold*, 11 York Leg. Record, 131; *Ridley Park Borough v. Railway Co.*, 24 Pa. C. C. Reps. 3; *Smith v. Pierce*, 10 Kulp, 422; *Stroudsburg v. Brown*, 1 Dist. R. 334. Among the papers returned by the justice is to be found what purports to be a "copy" of an ordinance of the same date as the date of the ordinance mentioned. The record cannot be supplemented by attaching a copy of the ordinance: *Wilcox v. Knoxville*, 2 Dist. R. 721; *Flood v. Ashley*, 5 Kulp, 462. Therefore, the first exception, alleging this incompleteness, must be sustained.

The second and third exceptions are also well founded. The thing in this record that is to serve the purpose of an adjudication, if there is any adjudication at all, is as follows: "Case heard

and disposed of according to law. Fine \$5.00 and cost. Costs \$3.81 or five days to Borough Lockup." Is that any adjudication at all? If there was a decision, in whose favor was it? Was the defendant convicted of anything? Is the fine mentioned and the costs referred to intended to indicate a penalty actually imposed by sentence, or only a penalty liable to be imposed in the particular case, in case of conviction? The record gives no satisfactory answer to these questions of material importance. Before a penalty can be imposed for the commission of an offence, a defendant must have been found guilty: *Laverty v. Com.*, 4 Pa. C. C. Reps. 137; *Adams, v. Com.* 1 Woodw. 417. There must be a formal conviction of defendant and a specific finding that he has committed a particular offence: *Com. v. Linaugh*, 13 Dost. R. 486. After the mention of the penalty above given, we find this, "making a total amount of \$8.81 in all paid before the subscriber G. M. Fennell, Chief Burgess of Avonmore Borough on Jan. 6, 1913." From that we can infer that there must have been a conviction, but a conviction of a matter made penal should not be a matter of mere inference, but should expressly appear in the record.

The fourth exception is based on the alleged unreasonableness of the ordinance. We need not consider that exception, inasmuch as there is no ordinance in this record that would enable us, from an inspection of its terms, to determine whether it is unreasonable or not. The physically attached paper is not in any wise judically incorporated into the record of the case, and, therefore, has no function to perform in determining the question of the validity of this supposed judgment.

The first, second and third exceptions are sustained; the proceedings of the burgess are reversed and set aside.

Brown et al. vs. Borough of Dormont, et al.

Boroughs—Petition of abutters—Defects in Petition—Laches.

Abutters with knowledge of the ordinance and the progress of the actual work are not entitled to an injunction on the ground

of defects in the petition after eighty-five per cent. of the work has been done.

C. P. Allegheny Co., No. 187, July Term, 1913.

John W. Dunkle and John Rebman, Jr., for plaintiffs.

John S. Cort, for defendants.

Opinion by Frazer, P. J., May 9, 1913:

The purpose of this bill was to restrain defendants from proceeding with the improvement of Espy avenue in the Borough of Dormont. From the bill, answer and proofs we find the following facts:

FINDINGS OF FACT.

First. The defendant, the Borough of Dormont, is a municipal corporation duly created. The Sawders Paving and Construction Company is a corporation, to whom the contract for improving Espy avenue was awarded. The other defendants are the members of the Council and the Chief Burgess of the Borough. Eva J. Brown and Ida M. Agnew, two of the plaintiffs, are owners of property abutting on Espy avenue.

Second. By ordinance of the Borough Council approved February 11, 1910, a grade on the "ten-foot lines" of Espy avenue, between Potomac avenue and Hillsdale avenue, was established.

Third. On May 1, 1912, a petition was presented to Council, signed by a majority in number and interest of the owners of property abutting on Espy avenue, which petition is as follows:

"The undersigned, who are the owners of the amount of frontage on Espy avenue set opposite our respective names, do hereby petition your honorable body to pass an ordinance for the grading, paving and curbing of Espy avenue between Potomac avenue and Hillsdale avenue in the Borough of Dormont, the costs and expenses of the same to be assessed and collected in the manner provided by law."

Among the signers to the petition are Ida M. Agnew, George R. Agnew, Eva J. Brown and A. Bert Brown, the plaintiffs

herein. The affidavit to this petition was made by Frank E. Cox, who is not an abutting property owner.

Fourth. Pursuant to the petition referred to in the preceding Finding of Facts, an ordinance, No. 86, was passed by Council and approved by the Burgess May 11, 1912, wherein it is recited that a majority in number and interest of the owners of property abutting upon the line of Espy avenue having petitioned for the grading, paving and curbing of the same, it was ordained "that the Street Committee be, and is hereby, authorized and directed to advertise for proposals for the grading, paving and curbing of Espy avenue, from Potomac avenue to Hillsdale avenue," and further that the contract therefor be let in the manner directed by law, the cost and expense of the improvement to be assessed and collected in accordance with the provisions of the Act of Assembly relating thereto.

Fifth. Following the passage of the ordinance of May 11th, 1912, the Street Committee entered into a contract with the Sawders Paving & Construction Company for the grading, paving and curbing of Espy avenue between the streets named. This contract was dated the 23rd day of May, 1912, and work begun on the improvement by the contractor on the 4th day of June, 1912.

Sixth. On June 4, 1912, Council met informally on Espy avenue, of which meeting property owners residing thereon had notice, and at that meeting members of Council together with the engineer and certain property holders discussed a proposed change of grade, and property owners were there notified that they would be given an opportunity to be heard at the meeting of Council to be held June 7, 1912.

Seventh. By ordinance No. 89, passed by Council June 7th, 1912, and approved by the Burgess on the 12th day of June, 1912, the grade of Espy avenue was changed from 11 per cent. to 11.58 per cent. This original ordinance was signed by the Burgess. The copy transcribed into the Ordinance Book, however, was not signed by him.

Eighth. On June 21, 1912, the following communication in writing, signed by Ida M. Agnew and George R. Agnew, two

of the plaintiffs, and three other abutting property owners was presented to Council:

"We, the undersigned, having signed a petition presented to you asking for the grading and paving of Espy avenue, Dormont borough, do hereby give you notice that because of your changing the grade on said street after the presentation of said petition and the authorization of said work and letting the contract for the same, without our knowledge or consent, we hereby withdraw our names from said petition and ask that you discontinue work on said street. We also give notice that we will not pay our assessed share for the grading and paving of said street."

Ninth. Subsequent to the meeting of Council on June 21st at which the communication signed by Mrs. Agnew and others, withdrawing their names from the petition for the grading and paving of Espy avenue, was presented work was ordered stopped upon the improvement pending an attempt upon the part of the property owners to agree upon a grade, and upon the failure upon their part to do so, on August 9, 1912, a special meeting of Council was called for August 22, 1912, due notice of which was given property owners. At the special meeting the following resolution was adopted:

"Whereas, on June 7, 1912, the Council of the Borough of Dormont passed an ordinance entitled 'An Ordinance establishing grades on the 13-foot lines of Espy avenue, from Potomac avenue to Hillsdale avenue, in the Borough of Dormont, Allegheny County, Pennsylvania,' which ordinance was duly approved by the Burgess on the 12th day of June, A. D. 1912; and

Whereas, certain property holders on said Espy avenue having objected to the grade as established by said ordinance; and

Whereas, the said matter of the grade of Espy avenue as established by said ordinance has been taken up for further consideration by Council of the Borough of Dormont after giving opportunity to all property holders on said Espy avenue between Potomac avenue and Hillsdale avenue to be heard, they having received ten days' notice in writing of the meeting called for the consideration of the matter of the grade of said Espy avenue; now, therefore, be it

Resolved, that the action of the Council of the Borough of Dormont in the passage of said ordinance of June 7, 1912, be and is hereby reaffirmed and the said ordinance is directed to be re-advertised, and the Chairman of the Street Committee is directed to instruct the contractor to proceed with the work of grading, paving and curbing said Espy avenue."

This resolution was not forwarded to the Burgess for his signature.

Tenth. The total cost of the grading of Espy avenue is estimated by the Engineer to be about \$2,000.00. At the time of filing the bill in this case, April 15, 1913, the grading had been practically finished and the contractors paid on account thereof, exclusive of the 15 per cent. reserved, \$1,564.00.

Eleventh. Plaintiffs reside on Espy avenue and had personal knowledge that the contractor was proceeding with the grading of the avenue under the ordinance of June 12, 1912, and took no steps to stop the work until this bill was filed on April 15, 1913.

CONCLUSIONS OF LAW.

First. The petition for the improvement of Espy avenue does not attempt to impose any conditions upon Council. It merely asks that an ordinance be passed for the grading, paving and curbing of the avenue. That an ordinance fixing a grade for the street had been previously passed by Council is immaterial, as Council by ordinance approved by the Burgess has a right to change the grade of any street when in their judgment deemed advisable, *Lewis vs. Borough of Homestead*, 194 Pa. 199. The petition for the improvement is unconditional, as the law requires it to be, and leaves to Council not only the kind of pavement to be laid but also the right to change the grade, *Newton vs. Emporium Borough*, 225 Pa. 17.

Second. Although the petition for the improvement was not sworn to by an owner of abutting property, and ordinance No. 89 when transcribed in the ordinance book was not signed by the Burgess, we are of opinion that plaintiffs are estopped from setting up those defects after the grading has been practically finished and the municipality has paid out on account of that

work \$1,564.00 and is liable for an additional 15 per cent. on that amount. Plaintiffs knew that the grading was being done under Ordinance No. 89 and made no effort to stop the work until the municipality had incurred an indebtedness of almost two thousand dollars. By their inaction they must be held to have acquiesced in the action of the Borough Council. Had they acted promptly the result of these proceedings would probably have been different, but having deferred action until this late day, they are in our opinion estopped from objecting to the improvement.

This conclusion cannot prejudice plaintiffs, as they have their remedy at law for any damage done their property.

In accordance with the foregoing Findings of Fact and Conclusions of Law the bill should be dismissed at costs of plaintiffs. Let a decree be drawn accordingly.

Fleetwood Borough vs. Moyer.

Municipal Liens—Frontage—Unrecorded Sale—Liability of remaining tract.

Where a tract of land is bought to give frontage to a rear tract and the two thus form one tract, then the improvement along the street is an improvement to the whole tract and the whole of it is liable for the cost and cannot be defeated by the secret conveyance of the frontage.

C. P. Berks Co., No. 26, April Term, 1912.

Stephen M. Meredith and Thos. K. Leidy, for defendant.

Fred A. Marx, for plaintiff.

Opinion by Endlich, P. J., October 25, 1913:

This is a *sic. fa.* upon a municipal lien for cost of paving and curbing on Locust street along property stated as belonging or reputed to belong to defendant. The extent of the paving, etc., was 246 feet. The property described in the lien has about 460 feet along Locust street and northwardly of the same over

180 feet, with a frontage of 38 feet on Franklin street. The ordinance under which the work was done was approved Aug. 21, 1908. The work was begun Sept. 7, 1910, and completed Sept. 21, 1910, notices requiring defendant to curb and pave having been served on him Sept. 5, 1908, Aug. 5, 1909, and July 26, 1910, and all disregarded. The claim, including a penalty of \$31.82, is \$190.94. The property described in the lien was acquired by defendant from different sources and at different times. That portion of it immediately fronting upon Locust street, forming a triangle about 4 feet wide at its eastern side and running about 250 feet to a point at Franklin street, its western extremity, was conveyed to defendant on April 7, 1908, the remainder of the property adjoining the triangle on the north in 1895. On July 25, 1910, defendant conveyed the triangle to one Gruber by deed remaining unrecorded. The case was tried in January last, and a verdict for plaintiff being rendered under direction of the Court, these rules were entered. The defendant's contention is, in substance, that the triangle and the property to the north of it are to be treated as separate and distinct tracts—that a lien could properly be filed only against the triangle—and that, defendant having parted with the ownership of it as stated, there can be no recovery for anything in this proceeding.

It seems impossible to assent to these propositions, or to what would obviously be involved in them, not only logically, but practically. It has, to be sure, been repeatedly decided that a municipality cannot hold for the cost of paving, or the like, properties which do not abut on the line of the improvement: see *Philadelphia v. Eastwick*, 35 Pa. 75; *Moorewood Ave.*, 159 id. 20; *Fifty-fourth Str.*, 165 id. 8; *Cooper v. Bellevue Bor.*, 51 Pa. Super. Ct. 597, and other cases. But in order to apply that principle here we should be required to hold that the mere fact of the separate conveyances of the two adjoining properties preserved their separate identities, no matter how incapable of separate use and enjoyment, or how manifestly united so as to form physically one entire tract. When defendant bought in 1908, the topographical survey of the borough showed the location of Locust street as cutting the triangular

strip to its northern side. No possible use could or can be made of it except in connection with the tract defendant got in 1895, as giving it a frontage on Locust street. Palpably its acquisition by him was for that purpose. There is nothing to show that it is in anyway separated from the larger tract. In common sense and having due regard to the surroundings, it can only be looked upon as forming part of the entire area owned by defendant north of Locust street, and the latter is made up, as a whole, of the two parcels, and so made up, fronting on Locust street. It would seem to follow that the improvement along the Locust street front ought to be considered and in fact was an improvement to the whole tract thus made up and situated and that the whole of it was liable for the cost thereof. And if that is so, that liability could not, of course, be defeated or evaded by the secret conveyance of the triangle by defendant to Gruber. The proceeding upon claims of this sort is essentially one in rem: *Philadelphia v. O'Conner*, 9 Distr. R. 230, and beyond the exigencies of notice little, if any, importance attaches to the matter of ownership: *City v. Cadwallader*, 22 W. N. 8. (See also the definition of "owner" in Sec. 1, Act 4 June 1901, P. L. 364).

Whether the Act 21 May 1913, amending Sec. 12 of the Act of 1901, just referred to, can have any application in this case, and if so, what is its precise effect, are questions which were not mooted at the argument and need not be passed upon at this time. If the statute applies, it seems to be capable of being invoked at any stage before actual entry of judgment, and to contemplate a proceeding (not taken in this case) for the limitation of the lien itself alleged to include more than it lawfully should cover. For both of these reasons it can hardly, in any view, stand in the way of a discharge of the rules presently before the Court, saying to defendant whatever right and remedy he may have under the enactment.

No questions other than those above stated and considered being raised in this case, the rules to show cause are discharged, without prejudice to defendant's right to proceed under Act 21 May 1913, if deemed applicable, for a limitation of the lien underlying this action, the entry of judgment upon the verdict

being, for that purpose, stayed for 10 days from the date of the filing of this order, and in case such proceeding be taken and entertained within that period, then until the same shall be finally disposed of.

City of Reading v. Consumers' Gas Co.

Ordinances—Penalties—Validity.

Penal statutes are strictly construed, and if there is any ambiguity or doubt as to meaning, for example, whether the shutting-off device should be installed by the property owner or the company, the court will not inflict the penalty.

C. P. Berks County, No. 54, November Term, 1913.

H. P. Keiser, for plaintiff.

R. L. Jones and J. Milton Miller, for defendants.

Opinion by Wagner, J., November 3, 1913:

FINDINGS OF FACT.

1. On May 18, 1912, the Mayor approved an ordinance previously passed by both Select and Common Councils of the City of Reading, which ordinance is:

"An Ordinance

Regulating the supply of gas and conveying same to buildings in the City of Reading, and providing for the better security of life and property in the conveyance and distribution of the same, and the providing of a device or devices enabling the shutting off of the supply of gas to such buildings at curb line.

Section 1. Be it ordained by the Select and Common Councils of the City of Reading: That every building within the city in which gas is used for illuminating, heating or other purposes, shall be equipped with a device or devices which shall enable the shutting off of the supply of gas to any building or buildings

from the outside thereof; such device or devices to be placed at the curb line of any such building, and to be of such design and construction as to enable such device or devices to perform, with reasonable certainty and safety the work required to be done thereby, namely, to shut off the flow of gas to such buildings.

Section 2. Any device or devices installed for the purpose of carrying out the provisions of this section, shall first be approved by the Plumbing Inspector of the City of Reading, and, after the installation thereof, the control of any such device or devices so installed in or upon any building under the provisions of this section, shall be under the supervision of the Plumbing Inspector of the City of Reading. This applies to all property.

Section 3. Any corporation, individual or parties coming within the provisions of the foregoing section, who shall neglect, fail or refuse to equip any property with a device or devices such as are described in the foregoing section, shall be fined not less than \$50 or more than \$100 for each offense, to be collected before the Mayor or any Alderman of the city according to law.

Section 4. That any ordinance or part of ordinance conflicting with the provisions of this ordinance, be and the same is hereby repealed, so far as the same affects this ordinance."

2. On September 12, 1912, the defendant company, upon the written request of the owner of the property No. 25 North 6th street, Reading, Pa., installed a gas pipe to convey gas for illuminating and heating purposes, leading from the gas main of the defendant company on North 6th street into the aforesaid building to take the place of an old pipe that had previously thereto conveyed gas from said gas main to this property.

3. After the passage of aforesaid ordinance, and before the installation of the gas pipe, the Plumbing Inspector of the city gave to the defendant company, on May 24, 1912, a certified copy of the ordinance.

4. When the defendant company, upon the aforesaid written request, installed the new gas pipe, it did not place a safety device as provided for by aforesaid ordinance.

DISCUSSION.

Suit was brought before an alderman to recover from the defendant the penalty provided in Section 3 of said ordinance upon the claim that the ordinance had been violated by the defendant in not placing a device at the curb line for the purpose of shutting off the supply at that point. Plaintiff contended that under this ordinance it was the duty of the defendant to do so. The alderman found in favor of the plaintiff, from which an appeal was allowed to this court. By agreement of both parties, trial by jury was dispensed with, and the case submitted to the Court under the Act of 22 April, 1874, P. L. 109. The facts as found in this case are not disputed. The defendant relies upon these three defenses: First, that the ordinance is uncertain and not specific enough in that it does not designate the person who shall place the device, whether the gas company that supplies the gas, or the owner of the building who has made the request for said installation. Second, that the ordinance is in violation of Article IV, of Section 2 of Act of May 23, 1889, P. L. 277, in that the bill is not clearly expressed in the title. Third, that the ordinance is unreasonable.

To determine this case it is but necessary to pass upon the first of these defences. This ordinance is clearly a penal one, and as such, it must be strictly construed. In *Endlich on Interpretation of Statutes*, Sec. 330, we have: "The rule of strict construction, in the case of penal statutes, requires, that, where an act contains such an ambiguity as to leave reasonable doubt of its meaning, it is the duty of the Court not to inflict the penalty." Also, in Sec. 345: "Statutes . . . which impose pecuniary burdens, also, are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties." See also *Walnut Coal Co. vs. Pa. R. R. Co.*, 237 Pa. St. 410, 418.

An examination of the first section of this ordinance shows the intent of councils, that is, that every building within the city in which gas is used for illuminating, heating or other purposes, shall be equipped with a device to shut off the supply of gas. It

states where this device shall be placed. Who shall place this device at the curb, whether the owner of the building, who is the owner in fee of the ground where the device shall be placed or whether it shall be by the company that supplies the gas, is not stated. Here is an uncertainty as to whose duty it is to thus place this device. This uncertainty is not cleared away by either Section 2 or Section 3. Section 2 merely provides that the device to be installed shall be first approved by the Plumbing Inspector of the City of Reading. Section 3 provides that any corporation, individual or parties coming within the provisions of the foregoing section shall be liable for the penalty.

We are of the opinion that by reason of failure to designate upon whom the duty of placing the safety device rests, this defendant cannot be made the subject of the penalty provided for by the ordinance. Under this view it is not necessary to consider the other two defences.

CONCLUSIONS OF LAW.

1. The defendant company is not subject to the penalties provided for in said ordinance, by reason of the failure in said ordinance to set forth upon whom the duty devolves of placing the safety device as provided therein.

2. The defendant is entitled to have judgment entered in its favor.

AND NOW, to wit, November 3, 1913, it is directed that the foregoing findings of fact and conclusions of law and this discussion be filed in the office of the Prothonotary of the above Court; and the Prothonotary is hereby directed to forthwith give notice to the parties or their attorneys of such filing as approved by the Act of April 22, 1874, P. L. 109, Sec. 2.

The Delaware County Electric Co. vs. Colwyn Borough.

Electric light company—Use of streets—Discretion of company and municipality.

When an electric light company has permission to occupy streets for the purpose of constructing and maintaining its system, subject to the approval of the highway committee, this permission may be refused in exceptional cases, provided the committee acts in good faith.

Where there is no restriction as to streets, the determination of what streets are to be occupied is in the company subject to the police power of the municipality.

C. P. Delaware County, No. 116, December Term, 1912.

W. Roger Fronefield, for plaintiff.

V. Gilpin Robinson, for defendant.

Opinion by Broomall, J., November 22nd, 1913:

This case is now ripe for final disposition on Bill, Answer and Proofs. There is no dispute that the plaintiff is possessed of the franchise and municipal consent to supply light, heat and power to the public in the defendant borough, together with the right to erect and maintain poles and string wires in the highways of the said borough. The municipal consent is evidenced by a borough ordinance approved July 28, 1910. It is predicated upon being accepted by the company with an agreement to comply with its requirements and upon filing a bond; all of which were in due course done. The permission in the first section of the ordinance is "to enter upon and occupy and use the streets, . . . alleys and highways . . . for the purpose of constructing, erecting, maintaining and operating wires, cables, poles, appliances, apparatus and services, overhead and underground, for the purpose of furnishing light, heat and power or any of them, derived from electricity, to the public and to private individuals and corporations, under and subject to the terms and conditions hereinafter named." The conditions referred to, that relate to this contention are two. The first is to be found in the second section in these words: "The location of all poles shall be subject to the approval of

the Highway Committee," and the second is to be found in the seventh section in these words. "That the said Delaware County Electric Company . . . shall annually pay to the said Borough of Colwyn for poles hereafter erected on public highways in said borough and for wires placed on said poles, as a license fee, the sum of one dollar for each pole, and two dollars and fifty cents for each mile of wire, . . . Provided, however, that if a license be issued for new poles and wires erected between July 1 and December 31 in any year, the license fee for said poles for that year shall be fifty cents and for said wires shall be one dollar and twenty-five cents for each mile or fraction thereof."

The plaintiff assuming that it was necessary to obtain the permission or license of the borough council under the seventh section of the ordinance, applied to council for permission to erect four poles on Fourth street. This the Borough council refused to grant, and having announced their intention of resisting the construction by force, this bill has been filed by the plaintiff to restrain such resistance.

The ordinance having granted the use of the highways of the borough without limitation to less than the entire system, and provision having been made by the ordinance for the approval of the highway committee as to the location of the poles, the only power which remained in the council was the exercise of the police power. The function of the highway committee was a supervision of the particular places where the poles should be located, and of course after they should be licensed or permitted, for how could a pole be located until it was licensed? The borough council in refusing permission was exercising the police power, and the plaintiff in applying for permission recognized the existence of this power. The seventh section of the ordinance refers to this power in providing for a permission or license. The power to permit implies the power to refuse. Moreover the grant could not be made except subject to the police power. The particular question involved in this case is, whether the exercise of the police power with reference to a system of streets will admit of the exclusion of the whole of a street from the occupation by poles. Where

there is no restriction on the streets or localities to be occupied, the determination of what streets should be occupied is in the pole company, except possibly so far as any particular street might be so exceptionally situated as to take it out of the general rule; *Commth. vs. Warwick*, 185 Pa. 623. This is in effect that where the consent to the use of the streets is given without limitation, the donee may use any or all of the streets, but this general rule is not universally applicable, because it is subject to the exercise of the police power, and such exercise may exclude a street exceptionally situated.

The franchise of the plaintiff is to furnish electric light to its patrons in the Borough of Colwyn. This franchise is not affected by being required to use one street rather than another in the exercise of the right. The municipal consent to the use of any or all of the streets is in subordination to the authority inherent in the municipality to exercise reasonable regulations; *New Castle City vs. Telegraph Company* 207 Pa., 371.

It is to be presumed that the refusal of the borough council to permit the plaintiff to plant its poles in Fourth street was in good faith and was a proper administration of the police power. Their good faith has not been assailed. They proffer the use of a small street or alley called Apple street, running parallel with and about 150 feet eastward from Fourth street. Every intendment should be accorded to the actions of local governments reasonably exercised.

It follows that the prayer for an injunction must be refused, and the plaintiff's bill must be dismissed.

A similar conclusion was reached under similar circumstances by Judge Bailey in *Lewistown Borough vs. Telegraph Company*, 10 Pa. Dist. Reps., 562.

We proceed to answer the requests for Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

PLAINTIFF'S REQUESTS.

1. The "Colwyn Electric Company" was duly incorporated, perpetually, under the Acts of the General Assembly

of the Commonwealth of Pennsylvania, by letters patent, granted to it on February 27th, 1907, and was authorized to supply "light, heat and power or any of them, by electricity, to the public in the Borough of Colwyn, in the County of Delaware and State of Pennsylvania, and to such partnerships, persons and corporations residing therein or adjacent thereto, as may desire the same at such prices as may be agreed upon."

ANSWER. This is found as a fact.

2. By virtue of the Act of General Assembly of the said Commonwealth, sundry corporations located in Delaware County aforesaid on July 1st, 1909, merged and consolidated, their and each of their respective rights, properties, franchises, powers and privileges with and into one corporation under the name of the Delaware County Electric Company.

ANSWER. This is found as a fact.

3. By virtue of the Acts of the General Assembly of the said Commonwealth, the "Colwyn Electric Company" by its deed duly executed and dated December 31st, 1909, and acknowledged the same day and recorded on April 4th, 1910, in the Office for Recording Deeds, etc., in and for the County of Delaware aforesaid in Deed Book "G," No. 13, page 224, "granted, bargained, sold, aliened, enfeoffed, released and confirmed its franchises and all its property real, personal and mixed" to the said Delaware County Electric Company.

ANSWER. This is found as a fact.

4. On July 18th, 1910, the aforesaid Borough of Colwyn passed an ordinance approved by the Chief Burgess of said borough on July 28th, 1910, as follows:

AN ORDINANCE NO. 76.

Granting permission to the DELAWARE COUNTY ELECTRIC COMPANY, a corporation organized under the laws of the State of Pennsylvania, its successors and assigns, to construct, erect, maintain and operate in, along, through, under across and over the highways of the BOROUGH OF COLWYN, DELAWARE COUNTY, PENNSYLVANIA, wires, cables, poles, conduits, appliances and apparatus for the supply of light, heat and power, or any of them, by electricity.

THE BURGESS AND TOWN COUNCIL OF THE BOROUGH OF COLWYN, DELAWARE COUNTY, PENNSYLVANIA, DO ORDAIN AND ENACT AS FOLLOWS:

Section 1. That permission be and is hereby granted to the DELAWARE COUNTY ELECTRIC COMPANY, its successors and assigns, to enter upon and occupy and use the streets, sidewalks, lanes, alleys, parks and highways of the said Borough of Colwyn, for the purpose of constructing, erecting, maintaining and operating wires, cables, poles, appliances, apparatus and services overhead and underground, for the purpose of furnishing light, heat and power, or any of them, derived from electricity, to the public and to private individuals and corporations, under and subject to the terms and conditions hereinafter named.

Section 2. The location of all poles shall be subject to the approval of the Highway Committee, and all poles shall be reasonably straight, and shall be painted and kept painted six feet from the ground, and each pole shall be identified as a part of the said company's distributing system. Wherever the poles shall be placed, the said Delaware County Electric Company shall replace the materials excavated, and relay all pavement or curbing removed, so that the same shall be in the same good condition as before being disturbed; and the said poles shall be so placed as to cause the least obstruction reasonably possible to public travel.

Section 3. All overhead wires shall be stretched and maintained at a distance of not less than sixteen feet above the ground.

Section 4. The rates to be charged other than the municipal lights, for lighting streets and highways of said borough, shall not exceed ten (10) cents per kilo-watt hour.

Section 5. That the said Delaware County Electric Company, its successors and assigns, shall at all times hereafter indemnify and save harmless the Borough of Colwyn aforesaid, of and from all and every claim for damage of every kind whatsoever which may arise from the construction, erection, maintenance or operation of its plant and system of distribution.

Section 6. That the said Delaware County Electric Company, its successors and assigns, shall furnish and continue

to furnish current for incandescent electric lights for all fire engine houses and for all municipal buildings without any charge or costs to the said Borough of Colwyn,—the said borough, however, agreeing that the use of the current shall not be wasteful and extravagant, but reasonable and necessary for the said purposes.

Section 7. That the said Delaware County Electric Company, its successors and assigns, shall annually pay to the said Borough of Colwyn, for poles hereafter erected on public highways in said borough and for wires placed on said poles, as a license fee, the sum of one dollar for each pole and two dollars and fifty cents for each mile of wire, and shall also maintain one (1) arc light of 800 to 1000 candle power free of all costs to the borough; PROVIDED, however, that if a license be issue for new poles and wires erected between July 1 and December 31, in any year, the license fee for said poles for that year shall be fifty cents and for said wires shall be one dollar and twenty-five cents for each mile or fraction thereof. No license fee, however, is agreed to be paid for poles and wires for service connections.

Section 8. That this ordinance shall take effect only upon the execution by the said Delaware County Electric Company of an agreement accepting all the terms and provisions of this ordinance, and the delivery of a bond in the sum of one thousand dollars (\$1,000) and the payment into the borough treasury of the sum of fifty dollars (\$50) to provide for the expenses of publishing and printing this ordinance. In case the said Delaware County Electric Company shall fail within thirty days after the approval of this ordinance by the Chief Burgess, to execute said agreement or deliver said bond, or to make such payment, this ordinance shall become null and void, and all rights and privileges granted by it shall cease and determine. All ordinances, or parts of ordinances, so far as the same are inconsistent herewith, are hereby repealed.

GEO. S. DREWES, Pres. of Council.

Passed record and final reading July 18th, 1910.

Approved by the Burgess July 28, 1910.

Attest: J. F. Willy, Sec'y.

H. B. POTTER, Burgess.

ANSWER. This is found as a fact.

5. That the Delaware County Electric Company complied with all the terms and conditions to which the grant of permission by said ordinance was made "under and subject"; accepted by writing, dated August 3rd, 1910 "all the terms and provisions of the said ordinance" and delivered a bond in the sum of one thousand dollars, which bond was accepted by said borough; and paid into the treasury of said borough the sum of fifty dollars to provide for the expenses of publishing and printing said ordinance, all of which were done within the time provided in said ordinance; furnished and continues to furnish current for incandescent lights for all fire engine houses and for all municipal buildings without any charge or cost to the said Borough of Cowlyn; has paid and continues to pay annually to the said borough a license fee for poles erected in said borough and for all wires placed thereon and maintained and still maintains one arc light of eight hundred to one thousand candle power, free of all cost to the borough.

ANSWER. This is found as a fact.

6. That the Delaware County Electric Company has complied with the following terms and conditions to which the grant of permission by said ordinance was made "under and subject"; accepted by writing dated August 3rd, 1910, "all the terms and conditions of the said ordinance" and delivered a bond in the sum of one thousand dollars, which bond was accepted by said borough; and paid into the treasury of said borough the sum of fifty dollars to provide for the expenses of publishing and printing said ordinance, all of which were done within the time provided in said ordinance; furnished and continues to furnish current for incandescent lights for all fire engine houses and for all municipal buildings without any charge or cost to the said Borough of Colwyn; and maintained and still maintains one arc light of eight hundred to one thousand candle power, free of all cost to the borough; paid the annual license fees for poles erected in said borough and for all wires placed thereon until after the bill was filed. The license fees due January 22nd, 1913, were not due until after the bill was filed and were paid before the trial of the case.

ANSWER. This is found as a fact.

7. In pursuance of the powers to it granted by its said charter and the said ordinance, the said Delaware County Electric Company had expended large sums of money in preparing to furnish light, heat and power by means of electricity to the public in the said Borough of Colwyn and to such persons, partnerships and corporations therein as desire the same and in planting poles and stringing wires on some of the streets and highways in said borough.

ANSWER. This is found as a fact.

8. Application for electric current was made to the said Delaware County Electric Company for lighting property in said borough which cannot be reached from the present pole line of said company and to conveniently and economically reach it, it is necessary to erect one pole on the west side of Fourth street, just north of Chestnut street and two poles on the west side of Fourth street just south of Chestnut street and one pole on the north side of Chestnut street just east of Fourth street, and to change the location of one pole on the north side of Chestnut street just west of Fourth street, and application was made to said borough, accompanied by a blue print, showing the proposed location of said poles, for a permit to be issued to said company allowing their erection in the said locations. The said borough refused to grant the permit applied for, not in the exercise of its police power, as to the regulation of the poles and lines nor the form nor the character of the same, nor because of their exact location on said streets, nor for any non-compliance with any of the imposed conditions, but upon a denial by said borough of the right of the Electric Company to plant any poles or string any wires on Fourth street in said borough.

ANSWER. This is not found as a fact.

9. The Delaware County Electric Company, to supply its consumers made application to said borough, accompanied by a blue print showing the proposed location of poles, for a permit allowing said company to erect one pole on the west side of Fourth street, just north of Chestnut street and two poles on the west side of Fourth street just south of Chestnut

street, and one pole on the north side of Chestnut street just east of Fourth street and to change the location of one pole on the north side of Chestnut street just west of Fourth street. The borough refused to grant the permit applied for not because of any non compliance by the Electric Company of any of the terms and conditions of the ordinance, but because it claimed the right under the ordinance to prevent the erection by the Electric Company of any poles or wires on Fourth street in said borough.

ANSWER. This is found as a fact.

10. The borough threatened to prevent by force the erection by the Electric Company of any poles and wires on Fourth street in said borough.

ANSWER. This is found as a fact.

11. That there is physically no way to light properties on the west side of Fourth street without planting poles on private property except by planting poles on Fourth street.

ANSWER. This is not found as a fact.

12. That there is no street or alley paralleling Fourth street in the rear of the properties fronting on the west side of Fourth street.

ANSWER. This is not found as a fact.

13. The statement that the borough refused to permit the company to locate its poles and wires on Fourth street is "that it is desired to keep Fourth street clear of all poles," without giving any reason therefor at all.

ANSWER. This is found as a fact.

14. That unless the plaintiff company is permitted to erect its pole line on Fourth street, it is practically a withdrawal from the plaintiff of the franchise granted it by the borough and a withdrawal of the right to light properties on the west side of Fourth street.

ANSWER. This is not found as a fact.

15. There is no way for the plaintiff to cross the railroad into the south part of Colwyn Borough, except by going on Fourth street and by going round through Darby Borough out Fifth street.

ANSWER. This is not found as a fact.

16. The council of the borough, from which the highway

committee was appointed, upon being applied to by the plaintiff for permission to erect poles on Fourth street refused it, not because the application was not made to the highway committee, but because they wanted Fourth street clear of poles.

ANSWER. This is found as a fact.

17. The solicitor for the plaintiff company applied to the borough and also to the highway committee thereof to know why the borough would not permit the erection of the poles, and was referred to the solicitor of the borough who replied that the borough is not willing that "poles should be placed upon Fourth street."

ANSWER. This is found as a fact.

18. That the highway committee refused to permit the erection of the poles on Fourth street after application had been made to it for such permission.

ANSWER. This is not found as a fact.

DEFENDANT'S REQUESTS.

1. The Delaware County Electric Company, complainant, is restricted in the location of all poles within the corporate limits of the Borough of Colwyn, to the provisions and requirements of Ordinance No. 76 of said borough, a copy of which is appended to complainant's bill and designated as Exhibit A.

ANSWER. This is found as a fact.

2. Complainant, prior to the filing of the bill in this case, made no application for the approval of the highway committee of defendant, as required by the terms of Ordinance No. 76, Section 2, as to the location of the poles in question.

ANSWER. This is found as a fact.

3. Complainant, prior to the filing of the bill in this case, made no application, in writing, to any of the authorities of defendant borough for approval of the location of the poles and wires mentioned in complainant's bill.

ANSWER. This is not found as a fact.

4. At the time of the filing of the bill in this case, there was owing and payable by complainant to defendant borough

under the provisions of said Ordinance No. 76, the sum of \$57.04 for license fees.

ANSWER. This is found as a fact.

5. Fourth street is one of the principal residential streets in said borough, and at the time of the filing of this bill was, and now is, free of poles and wires, and it is the desire of the authorities of said borough and of the residents on said street to keep said street free of poles and wires.

ANSWER. This is found as a fact.

6. It is reasonable and proper for defendant borough to require complainant to locate its poles and wires upon Apple street and Four and One-half street, rather than upon Fourth street.

ANSWER. This is found as a fact so far as Apple street is concerned, but Four and One-half street is in the Borough of Darby, an adjoining municipality. The west side of Fourth street is the dividing line between the Borough of Colwyn and the Borough of Darby.

7. It is as reasonably convenient for complainant to locate its poles and string its wires on Apple street as on Fourth street.

ANSWER. This is found as a fact.

8. It has not been shown by complainant that it is necessary to locate the proposed new poles on Fourth street in order to enable complainant to exercise the full rights and franchises conferred upon it by its charter and by ordinance No. 76.

ANSWER. This is found as a fact.

9. Complainant and its stockholders will not be unjustly deprived of its privilege to carry on its business within said borough and of the profits and income therefrom by refusal to permit the location of the proposed poles on Fourth street.

ANSWER. This is found as a fact.

REQUESTS FOR CONCLUSIONS OF LAW.

PLAINTIFF'S REQUESTS.

1. Subject to the consent of the municipal authorities and of the supervision and reasonable police regulations of the

Borough of Colwyn, the plaintiff after the merger with it, of the franchises of the Colwyn Electric Company, was vested with the right to plant its poles and string its wires upon and along the roads, streets and highways of the Borough of Colwyn for its corporate purposes.

ANSWER. This is affirmed.

2. After the passage by the borough and the acceptance of and compliance by the plaintiff with the ordinance approved July 28th, 1910, and subject to the supervision and reasonable police regulation of the Borough of Colwyn, the plaintiff has the right to plant its poles and string its wires upon and along the roads, streets and highways, including Fourth street and Chestnut street in the Borough of Colwyn.

ANSWER. This is affirmed.

3. The grant of permission by the borough to the plaintiff to plant poles and string wires on the streets, lanes and highways of the borough, when the plaintiff has accepted the terms of the grant and expended money in carrying them out, is a contract the obligation of which the borough cannot impair.

ANSWER. This is affirmed.

4. The fact that the license fees due January 22nd, 1913, were not due until after the bill was filed and their non payment was not a reason why the permit was refused, cannot now be urged as a reason why the permit was not issued.

ANSWER. This is affirmed.

5. The provision in the ordinance that "The location of all poles shall be subject to the approval of the highway committee" does not give the highway committee nor the council of the borough the power to restrict the grant to the plaintiff to the use of particular streets in said borough.

ANSWER. This is declined.

6. The provision in the ordinance that "The location of all poles shall be subject to the approval of the highway committee" does not give the highway committee nor the council of the borough the right to prevent the plaintiff from planting poles and stringing wires on Fourth street and Chestnut street in said borough.

ANSWER. This is declined.

7. The provision in the ordinance that "The location of all poles shall be subject to the approval of the highway committee" means the actual location on any street.

ANSWER. This is affirmed.

8. The Borough of Colwyn under the terms of its ordinance must, subject to the supervision and to the reasonable police regulations of the borough, permit the plaintiff to erect its poles and string its wires on and along Fourth street and Chestnut street in said borough.

ANSWER. This is declined.

9. The Borough of Colwyn has no legal right to prevent the extension by the Delaware County Electric Company of its pole line, by the erection of its poles and the stringing of wires thereon and along Fourth street and Chestnut street in said borough.

ANSWER. This is declined.

10. That unless the borough will permit the erection of poles on Fourth street in said borough, and if the said borough carry out its threat to prevent, by force, the erection of said poles, the said company will be unable to exercise its full rights and franchises conferred upon it by its charter and the said ordinance, and to carry on its business as authorized thereby in that part of said borough, and it and its stockholders will thereby be unjustly deprived of the privilege of carrying on its business and of the profits and income therefrom as contemplated by it when it incurred said expense and fulfilled its part of the provisions of said ordinance.

ANSWER. This is declined.

11. That the said Borough of Colwyn, its officers, agents, burgess and councilmen be perpetually restrained from preventing the Delaware County Electric Company, its officers and agents from extending its lines by the erection of its poles and stringing its wires thereon and maintaining and operating the same on Fourth street and Chestnut street in said borough, subject to the supervision and reasonable police regulations of said borough, for the purpose of supplying light, heat and power by means of electricity to the public in said borough

and to such persons, partnerships and corporations residing therein or adjacent thereto, as may desire the same.

ANSWER. This is declined.

12. The plaintiff company had the legal right, when it applied for permission to erect poles in the Borough of Colwyn and has the right now to light houses on the west side of Fourth street in Darby Borough, from poles planted in Fourth street.

ANSWER. This is declined.

13. The refusal of the borough to permit poles to be erected on Fourth street is practically a withdrawal of the franchise from the plaintiff, which the borough has no right to do.

ANSWER. This is declined.

14. That the Borough of Colwyn pay the costs of this proceeding.

DEFENDANT'S REQUESTS:

1. The Delaware County Electric Company has no rights and privileges to locate its poles and string its wires upon the streets and highways within the Borough of Colwyn, except in conformity with the provisions of Ordinance No. 76 of said borough.

ANSWER. This is affirmed.

2. As complainant had not complied with all the terms and conditions of Ordinance No. 76 of the Borough of Colwyn, at the time of the filing of this bill, in that it had failed to pay license fees as required thereby and had failed to secure the approval of the proposed location of the poles in question by the highway committee of said borough as in said ordinance provided, complainant is not entitled to the relief prayed for.

ANSWER. This is declined.

3. The Delaware County Electric Company has no right to locate its poles and string its wires upon and along the public roads, streets and highways of the Borough of Colwyn without the approval of the highway committee of the said borough first had and obtained.

ANSWER. This is affirmed.

4. The complainant has no right to enter upon, occupy

or use the streets and highways of the said borough for the purpose of constructing and erecting, maintaining and operating wires, cables, poles, etc., other than subject to the provisions of section 2 of said Ordinance No. 76, which requires that the location of all poles shall be subject to the approval of the highway committee and subject to the requirements of section 2 that, "the said poles shall be so placed as to cause the least obstruction reasonably possible to public travel."

ANSWER. This is affirmed.

5. The bill should be dismissed.

ANSWER. This is affirmed.

6. Complainant should pay the costs of this proceeding.

ANSWER. This is affirmed.

We make the following:

DECREE NISI.

And now, this case coming on to be heard on Bill, Answer and Proofs submitted, and after hearing, and upon consideration, it is ordered, adjudged and decreed that the bill of the plaintiff be dismissed with costs imposed upon the plaintiff in favor of the defendant.

Voute vs. Schuylkill Haven.

Paving and Grading of streets—Change of grade—Acts of May 24, 1878, P. L. 129, and March 21, 1806, 4. Sm. & R. 332.

Every municipal corporation has the implied power to pave and grade its streets; the Act of 1878 affords a complete remedy when damages are sustained by change of grade.

Equity No. 1, Sept. Term, 1861.

Opinion by Koch, J., October 13, 1913:

In his petition for said rule, the petitioner represents that he is now the owner of a certain lot or piece of ground situate

on the corner of Main and Dock Streets in the Borough of Schuylkill Haven; that on the 19th day of July, 1861, the said Henry Voute, the then owner of the said property, filed the said bill of complaint, alleging (inter alia) "that the defendant had commenced with their workmen and employees to cut down and alter the grade of the sidewalks and pavements in the immediate neighborhood of the said dwelling of the deponent, and had threatened to cut down the sidewalks and improvements along said lot of ground of this deponent, unlawfully and without ordinance changing the grade from the then existing grade;

"That in pursuance of said bill of complaint filed, after various pleadings and hearings ordered, the Court did hand down the following order: And now, October 12th, 1868, it is directed by the Court, that the writ of special injunction allowed in this case will be dissolved on this condition, that said borough shall fix the grade at the northeast corner of Dock and Front streets in said borough four inches below the top of the present curb on the opposite side of Front Street, thence the grade is to be at a regular slope until opposite the rear corner of Henry Voute's house, in Dock Street, at which point, the grade is to be six inches above the line of said Voute's cellar, thence along Dock Street the grade is continued at a regular slope till at the point at the rear end of said Voute's lot, it is to be eight inches above the grade surveyed by Jesse Hawley and approved by councils October 2nd, 1867. The pavement of said Voute at the line of Dock and Front Streets to be at a regular slope from his house to the curb so as to fall one and a half inches to the foot."

The petitioner further avers "that the said grade was established by the borough in accordance with the said order of Court and that the curbs were set and pavements laid in conformity with the grade handed down in said order," and that now "the Borough authorities, by their workmen and employees, have entered upon said sidewalk and notwithstanding said above recited order are changing the above established grade, so that it will be at some places, as explained to your petitioner, seven and eight inches below the grade existing now in conformity with the aforesaid order of Court."

The petitioner also "averts that this present changing of grade is illegal, is not sanctioned by any ordinance changing the grade from the above established grade, is done without due notice to him in flat violation of the above recited order of this Court."

The defendant Borough filed an answer to said rule, alleging that "It is not changing the grade in Dock Street; that the defendant Borough is paving said Dock Street during its entire length from Main Street to Centre Turnpike."

"That a large part of the curbing along said street was built many years ago and is now uneven, irregular, and out of line with the grade of said street, and must therefore be repaired and reset;

"That the curbing of your petitioner was in need of being thus repaired and reset;

"That said petitioner received due and proper notice from the Chief Burgess of said Borough to repair and reset the curbing along his property in said Dock Street, in accordance with the ordinances of the Borough in such case made and provided;

"That the said J. H. Filbert, petitioner aforesaid, failed and neglected to repair and reset said curbing. Whereupon the defendant Borough directed the contractor, J. B. Trexler, who is in charge of the paving and curbing of said Dock Street to make the necessary repairs to the curbing along the property of the petitioner;

"That the said curbing has been and is being repaired and reset in accordance with the grade of said street as established by the said defendant Borough from time to time, and that the repairing and resetting of said curbing is not a violation of the said order of this Court."

The said Borough also avers in its answer that the improvements now being made on Dock Street are being made under an ordinance approved the 1st day of April, 1912, which was passed by virtue of the provisions of an Act of the General Assembly approved the 12th day of May, 1911, P. L. 288, and also under an ordinance approved the 6th day of March, 1911. A copy of each of said ordinances is attached to the answer.

Briefly, the first of said ordinances provides for grading and paving Dock Street and assessing the owners of abutting properties with two-thirds of the expense thereof; and the second regulates sidewalks, curbs and gutters in said Borough.

The defendant alleges that the petitioner had all necessary notices in the premises. The Borough avers that this case was concluded by the decree of the 12th of October, 1868, and that we have now no jurisdiction to re-open this case; that we had no jurisdiction to issue the said rule; that the Borough has authority to grade Dock street whenever it becomes necessary to make the improvements provided for in said ordinance; that the grading and curbing of streets is exclusively vested in it, and that the court has no jurisdiction or control over the same, and that the petitioner has an adequate remedy at law, if he has been injured by the improvements now being made on said Dock Street.

An inspection of the record of this case shows that the subject matter of the bill in equity filed on the 19th of July, 1861, related to "the sidewalk and pavement in front of" the property in question, "on Front Street," for the distance of thirty feet, and that the order of this court was "to restrain the defendants from the further cutting down and changing the grade of the said Front Street and the sidewalks and pavements thereon." The writ of injunction was dissolved on the 12th of October, 1868, on the conditions above stated, a reference to which will show that Dock Street was considered in connection with the subject matter of the bill. It is proper to state that Front and Main Streets are identical. It is fairly to be presumed that the order was made in conformity with an agreement of all parties in interest. The petitioner himself calls the order an agreement, in the prayer of his petition; and in the rule now pending, as prepared by the petitioner, it is called an agreement.

Mr. Filbert's petition contains the averment "that the curbs were set and the pavements laid in conformity with the grade handed down in said order," but we do not think Voute and the Town Council could so agree in 1868 as to prevent a subsequent Town Council from grading and paving the street. One Town Council cannot legislate for all future time. "Acts

of Parliament derogatory from the power of subsequent Parliaments bind not: 1 Blackstone 90. Voute and then the Council agreed upon a grade. Such agreement was personal as to Voute and cannot forever bind the Borough to Voute's successor in title; in fact, the then Town Council could not make an agreement relating to the subject matter in the bill, so as to bind forever the Borough of Schuylkill Haven in references to grades and improvements of Dock Street.

"The authority to grade and pave streets is among the implied powers of a municipal corporation." *White vs. Borough of McKeesport*, 101 Pa. 394; *City of Williamsport vs. Commonwealth*, 84 Pa. 493. It is also specially given or recognized by numerous statutes, and a complete remedy at law is afforded all persons who sustain damages by a change of grade or in the lines of any street or alley in any Borough. See Act approved 24 May, 1878, P. L. 129. Once a remedy by statute is afforded, it must be strictly pursued. See Sec. 12 Act of March 21, 1806, 4 Sm. & R. 332, and *White vs. Borough of McKeesport*, supra.

In *McHale vs. Transit Co.*, 169 Pa. 416, the plaintiff filed a bill in equity to compel the restoration of the original grade of a street in Easton. The Plaintiff owned a property at the corner of two streets, and the grade of the street had been so changed that surface water was thrown on to the plaintiff's property and injured it. An injunction was refused, the Supreme Court saying: "We cannot understand how the courts can take away from the city, by a mandatory injunction, its right exclusively to establish the street grades."

Were we to make this rule absolute and restrain the Borough from interfering with the grade at the northeast corner of Dock and Front Streets, we would surely be taking away from said Borough the right exclusively to establish the grade of Dock Street. In our opinion, the petitioner is not entitled to be made a party in the case, nor to a reinstatement of the injunction.

And now, October 13th, the rule is discharged.

Middleburg Borough vs. Kratzer.

Boroughs—Traction engines on streets—Injunction—Custom.

Where it appears that there is a custom whereby the streets may be used by traction engines, a borough is not in a position to enjoin.

C. P. Snyder Co., No. 1, October Term, 1913.

Opinion by Johnson, P. J., October 6, 1913:

This was an action brought by the Middleburg borough against the defendants to restrain them from running their traction engine and threshing outfit over the paved portion of Market street in Middleburg borough. The case came on for hearing upon bill, answer, replication and proofs, and after argument of counsel, we arrive at the following

FINDING OF FACTS.

First. The borough of Middleburg has a poulation of five hundred and thirty-one inhabitants and is situate in the midst of a large and prosperous farming community.

Second. Middle creek, a large stream, runs eastwardly on the south side of the borough of Middleburg and is not reasonably portable for threshing engines, but is bridged just south of the borough. In order to go from one section of the farming community to another, either north or south, or east or west on the north side of Middle creek, it is reasonably necessary to pass through the borough of Middleburg on its streets or alleys, and there is no way of going from the north to the south side, or from the south to the north side of this farming community in the neighborhood of Middleburg borough except over the streets and alleys of the borough, without going about four miles around in either direction, two miles each way.

Third. The usual and customary way of going through the borough of Middleburg has heretofore been by way of Market street and Sugar street which are public highways and thor-

oughfares, as are the rest of the streets and alleys in the borough of Middleburg, and there is no other way except by the use of certain narrow alleys and streets known as North alley and South alley and Pine street and Walnut street, which can be used only with great inconvenience for the passage of traction engines and threshing outfits.

Fourth. In order to pass through these alleys and streets with a traction engine and threshing outfit, such as that belonging to the defendants, which is a train sixty feet long, it is necessary that the tanks be cut off from the train and pushed around by hand, and then in going from north to south or south to north it is necessary to turn four to six sharp corners, and also necessary to turn sharp corners in going from a section west of the town north of Middle creek to a section south of the town.

Fifth. The defendants' engine, empty, weighs eighteen hundred pounds and carries, when full, about eight or ten barrels of water, and it requires three or four men to push it when empty, and eight to ten men to push it when full of water.

Sixth. From the evidence in the case it appears that small pieces have been broken from the bricks on Market street by the passage of the engines of the defendants, and it appears that the same thing has been done by ordinary wagons carrying heavy loads of lumber, and the use of a traction over a street paved with brick, if properly done, may not be more severe upon the street than the use of a narrow track, heavily loaded wagon.

Seventh. That there are six to eight of these traction engines doing work and passing over the streets of Middleburg and vicinity from time to time during the threshing season several months in a year, and the passage of traction engines, such as was used by the defendant, over the roads and streets in the borough of Middleburg and vicinity is and has heretofore been a common and ordinary usage.

From the foregoing facts in this case we find the following

CONCLUSIONS OF LAW.

First. The use of traction engines over the streets and alleys of Middleburg and vicinity having become usual and ordinary, the defendants under the law have a right to free passage over such streets and alleys, it being the duty of the borough authorities to provide streets suitable for such passage.

Second. The injunction should be dissolved and the bill dismissed.

DISCUSSION.

Market street is a public highway and thoroughfare, and one of the most frequently and generally traveled in Snyder county, and it is therefore necessary under the law that it be maintained so as to accomodate all of the usual traffic.

The evidence in the case shows that such traction engines and outfits as were used by the defendants are ordinary, usual and customary in the neighborhood and vicinity of Middleburg borough, and therefore the borough authorities are required to maintain Market street so as to accommodate traction engines and outfits like that of the defendants. The borough authorities may impose reasonable restrictions upon those who use the streets for passage of traction engines and outfits so as to do as little injury to the streets and pavements as possible; but they cannot entirely prevent the use of the streets and pavements by traction engines and outfits in passing through the town.

In *Com. v. Dennison*, 48 Pa. Super. Ct. 293, on page 299, Judge Henderson, delivering the opinion of the court, said: "The act of June 30, 1885, P. L. 251, regulating the movement of machinery propelled by steam on the public roads and highways of the commonwealth, did not authorize the continuous use of such motors with trains attached. It is a restrictive statute. It recognizes the practice of moving such machinery on public roads, but declares specifically how that shall be done. The general adoption of such machinery for threshing, baling hay, cutting ensilage and like services renders the use of the highway necessary in moving from place to place

for the prosecution of such work, but this is a very different use from that of daily trips to and fro on the same highway. An occasional use would not create a nuisance; daily use of the same portion of the road might do so. Moreover, the movement of a traction engine of the kind in ordinary use is a very different operation from that of the train which the defendant used."

In *Com. v. Allen*, 148 Pa. 358, on page 364, the court said: "As a general rule, highways and bridges are constructed for ordinary use in an ordinary manner, and not for an unusual or extraordinary use, either by crossing at great speed, or by the passing of a very large and unusual weight. A township is no bound to do more than to so construct its bridges as to protect the public against injury by a reasonable, proper and probable use thereof, in view of the surrounding circumstances, such as the extent, kind and nature of the travel and business over them."

There was no evidence in the case showing that the defendant's engine was unusual or extraordinary in weight or size. The evidence did show that the use which they made of the streets of the borough was ordinary and usual in the borough and vicinity. The borough has no ordinance providing limitations. Such ordinance we think would be proper and legal though we do not think that an ordinance would be valid which would entirely prohibit the passage of traction engines such as that of the defendants.

And now, Oct. 6, 1913, this cause came on to be heard upon bill, answer, replication and testimony and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed that the injunction heretofore awarded restraining Artie Kratzer and Harvey Kratzer from passing over the paved portion of Market street in the borough of Middleburg with their traction engine and outfit be dissolved, and that the bill be and is hereby dismissed at the cost of the plaintiff.

Unless, within ten days after notice of the entry of the decree has been given as above directed, exceptions to the verdict and findings shall be filed with the prothonotary, the decree nisi will become absolute *sec. reg.*

Borough of Reynoldsville vs. Reynoldsville Water Company et al.

Boroughs—Water Companies—Acquisition of water plant—Acts of April 29, 1874, P. L. 73; June 2, 1887, P. L. 310; May 31, 1907, P. L. 355; April 22, 1909, P. L. 135; June 8, 1893, P. L. 345.

Under the Act of 1874, a borough may acquire a plant of a water company after twenty years by proceeding under the provisions of that act. This right is not affected by the acts of 1907 and 1909.

Mandamus will issue to compel a company to produce a detailed itemized statement to show the cost of erecting and maintaining the plant.

C. P. Jefferson Co., No. 1, August Term, 1913.

S. M. McCreight and W. N. Conrad, for plaintiff.

M. M. Davis, H. M. Mercer, W. B. Adams and G. I. McDonald for defendant.

Opinion by Reed, P. J., September 8, 1913:

It is conceded by the plaintiff that the right sought to be enforced by this bill should be asserted by a writ of mandamus, and it therefore moves that the cause be certified to the law side of the Court where it may be heard as on an application for such writ. This is resisted by the defendant on the ground that the plaintiff is not entitled to a writ of mandamus since clause 7, Section 34, of the Act of April 29, 1874, P. L. 73, upon which it bases its right thereto, has been repealed by the Act of May 31, 1907, P. L. 355, as amended by the Act of April 22, 1909, P. L. 135. The Act of 1907 provides a new method whereby a municipality may acquire the plant of a water company, and repeals all acts or parts of acts, whether local, special or general, inconsistent therewith.

The defendant company was incorporated in 1888, under the Act of 1874, and therefore did not acquire under the law existing at the time of its incorporation, an exclusive franchise

or privilege to furnish the plaintiff municipality with water. But the Act of June 2, 1887, P. L. 310, depriving water companies, incorporated after its passage, of such exclusive privilege, does not purport to repeal clause 7, section 34, of the Act of 1874, giving a municipality the right, after twenty years from the introduction of water into the district, to become the owner of the plant, by paying therefor, the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared. The defendant company took its charter subject to the right of the plaintiff municipality to acquire its plant, after twenty years, upon payment of the net cost of erecting and maintaining the same, with interest thereon, less dividends. This implied contract between the plaintiff and defendant was beyond the power of the Legislature to nullify by the Act of 1907. The manner of ascertaining and arriving at the value of a water company's plant under the Act of 1907, is entirely different from that provided in the Act of 1874. The Act of 1907 contemplates a valuation that takes into consideration the value of the company's franchise, whereas the Act of 1874 expressly excludes this uncertain element in the valuation of the plant, and provides for a fixed value that can be arrived at by computation. Under the Act of 1907, the company's plant may be acquired at any time by the municipality, with the consent of the company, by paying therefor, its appraised value, presumably the approximate market value of its stock. But the right of a municipality to acquire a water plant under the Act of 1874, does not accrue until twenty years after the water has been introduced by the company into the district.

It is not entirely clear what the Legislature had in view when it passed the Act of 1907. The Act leaves it optional with the water company whether it will sell and convey its plant at the valuation fixed, and the worst that can happen if it refuses to do so, is the loss of its exclusive franchise or privilege, if it possesses one. Possibly the Legislature had in view that certain municipalities had exhausted the power to supply themselves or the citizens thereof with water, and intended by this enact-

ment to re-invest them with such power where the water company refused to sell and convey its plant at a valuation fixed by the Court upon the report of appraisers appointed to value the same. Whether the Legislature had the power to do this, it is not now necessary to consider. Perhaps its only purpose was to provide a method whereby the municipality and the water company might amicably effect a sale and purchase of the company's plant. But it is not material in the determination of the question now before the Court what was the purpose or intent of the Legislature in the passage of this Act, for it was beyond its power to take from the plaintiff the right to acquire the defendant's plant under the Act of 1874, or to take from the defendant the right to have the amount to be paid therefor determined in the manner provided in said Act: *Manheim Borough vs. Manheim Water Company*, 229 Pa., 177. If the defendant's contention were sustained, there would be no law in existence whereby a municipality, at the expiration of twenty years or any other time, could acquire the plant of a water company without its consent. If it be conceded that the Act of 1907 is a valid piece of legislation, there is no reason why the method therein provided, and the method provided in the Act of 1874, for acquiring the plant of a water Company may not co-exist.

And now, September 8, 1913, for the reasons stated in the foregoing opinion, the demurrer is sustained, and the rule heretofore granted to show cause why the Court should not certify the cause to the law side of the Court, at the costs of the plaintiff, is made absolute, and the cause is hereby so certified. The pleadings to consist of the plaintiff's bill, which is to stand as a petition for a writ of mandamus, with leave to the plaintiff to file within ten days from this date, any amendments thereto deemed necessary; the defendant to file within twenty days from this date, its return or answer to said petition, as amended, as to a writ of mandamus issued in the alternative form, and thereupon issue is to be joined thereon as directed in the Act of June 8, 1893, P. L. 345. The issues of fact and law thus raised to be heard and determined according to law and the plaintiff's right to a peremptory mandamus, as prayed for, thereby ascertained.

**Adams Express Company vs. City of Harrisburg and
Owen M. Copelin, Collectcor of City Taxes.**

Taxation—Exemption of public service property.

The exemption of local taxation of public service corporation property is limited to such property as is indispensable to the accomplishment of the corporate purposes; the horses of a joint stock association is not within such exemption.

C. P. Dauphin Co., No. 498, Equity Docket.

Thomas DeWitt Cuyler and Lyman D. Gilbert, for plaintiff.

Daniel S. Seitz, City Solicitor, for defendant.

Opinion by Kunkel, P. J., December 17th, 1913:

This cause comes before us on a demurrer to the plaintiff's bill. The plaintiff is a joint-stock assocaition, organized under the laws of the State of New York for the purpose of carrying on the business of express forwarding from and between and to any places all manner of parcels, goods, specie, bullion, and other articles and property, animate and inanimate. It is engaged in business within the limits of the City of Harrisburg, making personal delivery of express matter to consignees and collecting outgoing express matter from shippers at their respective residences or places of business. It uses in its business a number of horses which are necessary for the proper conduct thereof.

The defendants are the City of Harrisburg and Owen M. Copelin, Collector of City Taxes. The City of Harrisburg, by virtue of an ordinance duly passed, assessed a tax on certain of the plaintiff's horses, which were used in and were indispensable to the carrying on of its business. Plaintiff having refused to pay the tax, Owen M. Copelin, the collector, attempted to collect it by levying upon and selling the horses. The plaintiff seeks to enjoin the collection of the tax, claiming that the property against which the tax was assessed and out of which the attempt is made to collect it is not subject to local taxation.

By the decisions of our courts, the non-liability for local taxes under general tax legislation has been limited to public service corporations and to such property belonging to them as is indispensable to the carrying out of their corporate purposes. We have not been referred to any authority which goes beyond the doctrine thus stated, nor to any which holds that the property of a joint-stock association doing the business of a common carrier is not subject to local taxation. It is true, such a company is rendering service to the public, but it is not performing a duty which it owes to the public by reason on a special grant from the State. It needs no special grant, nor has it any, to transact its business. It is in no different position from that of corporations generally or of an individual or of a partnership carrying on a similar business. It is not, therefore, performing an obligatory public function, as a corporation does which is dependent upon a special grant from the State for the performance of a service beneficial to the public, with which the taxation of its property by the local authorities would seriously interfere. Out of these considerations arises the freedom from local taxation which is afforded public service corporations. These considerations do not obtain in the case of the plaintiff association: *Carbon Iron Co. vs. Carbon Co.*, 39 Pa. 251; *Lackawanna Iron and Coal Co. vs. County of Luzerne*, 42 Pa. 434; *County of Erie vs. Erie and Western Transportation Co.*, 87 Pa. 434; *Pittsburgh Appeal*, 123 Pa. 374; *Allegheny County vs. Diamond Market*, 123 Pa. 164; *Schuylkill County vs. Citizens' Gas Co.*, 148 Pa. 162.

We are of the opinion that the property in question is liable for the taxes imposed upon it and that the plaintiff is not entitled to the relief which it seeks. Accordingly the demurrer to the bill is sustained. The bill is dismissed at the costs of the plaintiff.

McDowell vs. Borough of North Wales.

Icy Pavements—Negligence—Evidence.

Where the plaintiff was walking along listlessly and fell on the icy pavement, her negligence is for the jury. After walking

back to her son-in-law's, statements then made are too remote. A copy of the weather bureau report at Philadelphia is not sufficient after-discovered to warrant a new trial when witnesses testified that conditions were not the same at North Wales during the same period.

C. P. Montgomery Co., No. 206, October Term, 1912.

G. Herbert Jenkins, for plaintiff.

J. B. Larzelere, Jr., for defendant.

Opinion by Swartz, P. J., June 2nd, 1913:

The plaintiff claimed that she was injured because the defendant borough failed to keep a certain side-walk in safe condition for travel.

The jury found a verdict in favor of the defendant. There was a flagstone pavement in front of a row of houses. The plaintiff claimed that one of these stones was out of place, that it projected above the adjoining stone and slanted toward the curb. She says she struck her right foot against the stone that was sticking up, that she lost her equilibrium, and then slipped with her left foot on the slanting or slippery stone.

Numerous questions of fact were raised under the evidence. Was the stone sticking up above its neighbor sufficiently to make the walk unsafe or to bring constructive notice to the borough? Did she fall over this stone or at some other place not designated in her statement? Did she fall on an icy pavement as she stated to several witnesses? The pavement was icy and very slippery, as described by her own witness, Dr. Slifer. He says it rained in the night and the cold weather formed the ice.

The plaintiff was familiar with the defect she described in the pavement. She saw the slanting stone in her daily passage over the sidewalk. There were two or three other ways open to her,—the road way or street where carriages passed, an alley in the rear of the row of houses, and keeping nearer the house line.

The plaintiff told her doctor, when he called to treat her arm, that she slipped on the icy pavement, fell and broke her

arm. She brought her complaint to the burgess of the borough and stated she fell on a slanting icy pavement. She made no claim at that time that she struck her foot against a projecting stone.

Under the evidence the place of the accident was in doubt and the weight of the testimony indicates that she fell because of an icy pavement, for which the borough was in no way responsible. The jury must have so found, or it may have reached the conclusion that she should have avoided the projecting stone, on the dark morning, by following along the pavement nearer the house line, or by taking her course along the highway or alley and thus escape a danger that was very well known to her.

The after discovered evidence cannot help the plaintiff's case. It consists of a copy of the United States Department of Agriculture, Weather Bureau, for the 27th day of February, 1912. We have no evidence, from this copy, what the conditions were on the 26th day of February, up to midnight. The copy gives weather conditions at Philadelphia. Apparently they differed from those during the same period at North Wales. Even if we can accept this copy, as evidence, it is not sufficient to overcome the proofs of the plaintiff's declarations, the doctor's evidence, and that of the defendant's witnesses. Dr. Slifer, on account of the icy pavements, did not trust himself on them, but took the middle of the road to reach her house, and entered by the back door.

In plaintiff's brief, in support of a new trial, the order to strike out the evidence of Mrs. Wade, given on cross-examination in reference to the light, is discussed and it is claimed, the court committed error.

When the motion was made, we were of opinion that the evidence was not proper cross-examination, because the witness was not examined in chief upon the question of lights. We asked that the stenographer refer to his notes. This was waived by counsel for plaintiff to save time. If we were in error, it was because the notes were not examined. It now appears that the witness did say "I could not tell whether the light was burning that morning." This evidence in no way militated against the plaintiff's case, and

there was therefore nothing to contradict by anything that was said in the letter of Mrs. Wade. The letter could not have been substituted for her sworn evidence before the court. At most, it could only be used to contradict her testimony under oath. But, as we said, there was nothing material, before the jury, in her testimony, that called for any contradiction. It is also contended that the offer to prove by Norman Anderson, what the plaintiff said about the happening of the accident, should have been sustained.

An examination of the record clearly discloses that these declarations of the plaintiff were offered as a part of the *res gestae*. Counsel stated that they were made about three minutes after the accident. We answered that the plaintiff arose from her fall, walked back the distance of eleven house fronts to her own home, and then made the statement to her son-in-law. We concluded that this was too remote from the happening of the accident. The circumstances are similar to those in *Keefer v. Life Ins. Co.*, 201 Pa. 448, where it was held that the fall and subsequent declarations were too remote in time and place.

It is now urged that the declaration was competent to rebut any inference that the plaintiff's version of the accident was a recent fabrication. It is sufficient to say, that the plaintiff's counsel cannot offer the declarations for one purpose, and then after the trial is over contend that they were competent for an entirely different purpose which was not mentioned or suggested at the trial.

Our answer to the first point, submitted by the plaintiff, was an affirmance, with an added explanation that made the whole answer still more favorable to the plaintiff.

We think the answers to the plaintiff's other points were free from error. A point may be taken from the decision of a case, in the appellate court, and follow the exact words in that case, and yet the point, if affirmed, without explanation, may mislead a jury when the particular facts and circumstances in the case on trial are considered by the jury. Where numerous questions are raised under the evidence such misleading is apt to follow.

The criticism of our answers to the defendant's points, so far as it relates to the assumption that there was no evidence of a slight displacement of the stones, by frost, is not supported

by the record. Mr. Frissell, when asked what caused one stone to be slightly above the other, answered, "it must have been frost." It requires no evidence to prove that such conditions arise from frost. It is a familiar fact to all of us.

Again, there was evidence from which the jury could find that the plaintiff was walking along listlessly and humming to herself. She was late and was singing as she passed along or humming as she terms it.

We are not aware of any substantial error in our answers to the points submitted by the parties. The law, we think, was repeated in conformity with the ruling of the higher courts and the language used was in accord with that used in these decisions. Our oft repeated words left the jury in no doubt of our meaning.

The jury found for the defendant borough, and could not well do otherwise if they followed the weight of the evidence.

And now, the reasons for a new trial are dismissed, and the motion for a new trial is overruled. The prothonotary will enter judgment upon the verdict of the jury upon the payment of the verdict fee.

Borough of Knoxville vs. Pittsburgh Railways Company.

A Justice of the Peace has no jurisdiction in a case to collect a pole license tax.

C. C. Allegheny Co., No. A 41, 1913.

Opinion by Way, P. J.:

This is a suit in assumpsit originally brought before a Justice of the Peace to recover a license tax on poles and wires of the defendant imposed by ordinance of the Borough of Knoxville. The liability to pay the amount of this license tax does not rest upon a "contract, express or implied" within the meaning of the acts of assembly conferring jurisdiction upon a Justice of the Peace, and consequently this Court has no jurisdiction of the same on appeal. The suit is accordingly dismissed for want of jurisdiction.

Neuberger vs. Shigo, et al.

Boroughs—Police Officers—Executive Approval—Acts of May 23, 1893, P. L. 113; June 8, 1911, P. L. 720 and June 19, 1913, P. L. 538.

The action of town council in fixing police salaries should be submitted to the burgess for approval; otherwise payment may be enjoined at the suit of the burgess.

C. P. Luzerne Co., No. 9, October Term, 1913.

W. A. Valentine, for plaintiff.

Opinion by Fuller, P. J., December 26, 1913:

By this bill the plaintiff who is the chief burgess of Freeland borough, in this county, seeks to restrain the defendants, who are officers of the borough council, from paying to the borough solicitor, secretary and policemen, certain salaries fixed by the council without submission to the burgess for approval.

A preliminary injunction, still in force, was granted and upon the hearing of motion to continue the same it was agreed by the parties that printing be waived, that plaintiff file a replication, and that the hearing on the injunction should be treated as a final hearing on bill, answer and replication.

From admissions and evidence we find as

FACTS:

1. As averred in the first paragraph of the bill, the plaintiff, S. J. Neuberger, is a resident, taxpayer and chief burgess of the borough of Freeland, in this county, duly qualified and acting as such since September 11, 1911.

2. As averred in the second paragraph of the bill, one of the defendants, John Shigo, is president of the said borough council, duly qualified and acting as such since 1910.

3. As averred in the third paragraph of the bill, one of the defendants, William Joyce, is secretary of said borough council, duly qualified and acting as such since 1909.

4. As averred in the fourth paragraph of the bill, one of the defendants, James W. Bell, is treasurer of said borough council,

duly qualified and acting as such since the first Monday of January, 1912.

5. As averred in the fifth paragraph of the bill, at a meeting of said borough council, held June 17, 1913, said council, by motion, resolution, or ordinance, however the action may be denominated, employed H. A. Shovlin as borough solicitor for three years, and fixed his salary at \$500.00 per year.

6. As averred in the sixth paragraph of the bill, at said meeting, said council, by similar action increased the salary of James Welsh, chief of police, from \$60 to \$75 a month; of Frank Malloy, patrol policeman, from \$60 to \$70 per month; of Frank de Pierro, patrol policeman, from \$60 to \$70 per month, and of William Joyce, secretary of council, from \$150 to \$300 per year.

7. As averred in the seventh paragraph of the bill, the action of council aforesaid employing borough solicitor, fixing his salary and increasing the other salaries aforesaid, has never been submitted to the plaintiff as burgess for approval.

8. As averred in the eighth paragraph of the bill the defendants, Shigo as president and Joyce as secretary of council, have issued orders and intend to issue other orders for the payment of said increased salaries to the secretary and the policemen, but disclaim intention to pay the salary to the solicitor.

We state as follows our conclusions of

LAW:

1. The injunction, so far as it affects the solicitor, should be refused, because the question of his salary is eliminated by the disclaimer of intention to pay, and the question of his right to exercise the office cannot be determined in this proceeding but only on quo warranto.

2. The injunction, so far as it affects the secretary, should be refused, because the employment of such an officer is a matter of internal administration, not embraced within the principle applicable to policemen.

3. The injunction, so far as it affects the policemen, turns upon the question whether their salaries could legally be determined by the council without submission to the burgess.

The Act of June 8, 1911, P. L. 720, in force June 17, 1913, when the council took action, provided that borough policemen "shall be under the control and direction of the council of the borough in which they shall be appointed as to the time during which and the place where they shall perform their duties; they shall, when on duty, be subject to the direction of the chief burgess or burgess in the enforcement of the ordinances; and they shall receive such compensation to be paid from the borough treasury as may be agreed upon between them and the council, and be subject to removal or discharge at the discretion of the council of such borough."

This Act, after June 17, 1913, was amended by Act of June 19, 1913, providing that "such policemen shall, after the passage of this Act, be under the control and direction of the chief burgess or burgess of the borough in which they shall be appointed, as to the time during which, the place where, and the manner in which they shall perform their duties, and they shall receive such compensation, to be paid from the borough treasury, as has been heretofore provided or may hereafter be provided by ordinance or resolution of the borough council."

If the situation is governed by the later Act, it is plain that the salaries could not be fixed without submission to the burgess, under Act of May 23, 1893, P. L. 113, and on authority of cases cited in *O'Mara v. Exeter*, 15 L. L. R. 477.

The situation is governed by the later Act because the case discloses no contractual relation between council and officers based upon the councilmanic action of June 17, 1913, either in respect to term or salary, and therefore nothing prevents the immediate operation of the enactment of June 19.

And even if the situation is not governed by the later Act, we are unable to distinguish the action of council under the former Act, from other councilmanic action governed by Act of 1893, *supra*.

4. The increase in the salaries of the policemen voted by council on June 17, 1913, could not legally take effect without submission to the burgess, and therefore payment of such increase should be enjoined.

5. The prothonotary is directed to enter and give notice of the following

DECREE NISI:

Now, December 26, 1913, this cause came on to be heard at this term and was argued by counsel, and upon consideration thereof by the Court, it is ordered, adjudged and decreed that the preliminary injunction heretofore granted be continued and made perpetual, restraining the defendants from paying to James Welsh, chief of police; Frank Malloy, patrolman, and Frank de Pierro, patrolman, the increase of salary voted to them, respectively, by action of council on June 17, 1913, until such action shall have been duly submitted to the burgess; but that the said injunction, so far as it affects the solicitor and the secretary, be dissolved and the prayer of the bill pro tanto be denied.

Commonwealth vs. Butler Borough.**Boroughs—State Highways—Repairs—Turnpike Roads.**

When a turnpike road is conveyed to the State Highway Department the duty to maintain such portion as is in a borough is upon the State Highway Department and not on the borough.

Q. S. Butler Co., No. 31, Dec. Term, 1913.

Opinion by Galbreath, P. J., Jan. 1, 1914:

The testimony in this case shows that the Allegheny and Bulter Plank Road, leading from the city of Pittsburgh into the borough of Butler, was, until recently, owned by a private corporation. That under the act of May 31, 1911, P. L. 481, the said road was made a state highway and was designated as follows, to wit: "Route 72 from Pittsburgh to Butler commencing at a point on the boundary line of the city of Pittsburgh . . . then by way of Mahard into Butler, Butler county." The evidence further discloses that by deed bearing date April 23, 1913, the Allegheny and Butler Plank Road Company conveyed all of its interest in said road beginning at the end of the paving

of South Main street in the borough of Butler and extending to the Allegheny county line, to the commonwealth of Pennsylvania, and the same was, May 6, 1913, accepted for the state by the state highway department, which immediately thereafter proceeded to improve all of said road, except that part lying within the limits of the borough of Butler. A portion of the roadway of said Plank road consisted of a bridge spanning the Connoquenessing creek within the borough of Butler. At the September term of the quarter sessions court of the said county of Butler, the constable of the Third ward of said Borough made return that said bridge was in a dangerous condition, as well as that portion of the Plank road lying within the limits of said borough. Thereupon a rule was issued on said borough with notice to the state highway department, pursuant to which the said borough filed an answer disclaiming any authority over or responsibility for the condition of said road and bridge. No answer was filed on the part of the state highway department.

The said act of May 31, 1911, in section 6, provides that "after the adoption of this act, all those certain existing public roads, highways, turnpikes and toll roads or any parts or portions thereof, subject to the provisions hereinafter made in the case of turnpikes and toll roads . . . shall be rebuilt, constructed, repaired and maintained by and at the sole expense of the commonwealth and shall be under the exclusive authority and jurisdiction of the state highway department." Section 9 of said act provides, *inter alia*: "That where any existing turnpikes or toll road, owned by private companies, shall form any part of the state highways herein designated, the same are not immediately taken over for improvement or repair, but the purchase thereof shall be deferred by the state highway commissioner and the same shall remain and be controlled by the owners thereof until such time as the work of improvement of all other state highways shall have been completed. If, in the judgment of the state highway commissioner, local or special conditions of any of said turnpikes or toll roads are such as tend to interfere with travel thereon and shall sooner require purchase and control thereof by the state,

then upon the approval of the governor such turnpikes shall be taken over in accordance with the provisions of this act." Section 10 of said act provides as follows: "Anything herein contained or any apportionment of the state into highway districts shall not be construed as including, or in any manner interfering with the roads, streets and highways in any of the cities, boroughs or incorporated towns of the commonwealth, provided where any such road shall form a part or section of any state highway and is not improved according to the standards of the highway department or in a manner equal to said standards by the borough, the state highway commissioner with the consent of the borough councils may improve such section at the expense of the commonwealth."

We think the evident meaning of the foregoing provisions of said act of assembly is that the roads taken over by the state highway department and described in the various routes designated in said act of assembly shall after the act of taking over has been completed be maintained wholly by and at the expense of the state, except that where a portion of any route lies within any city, borough or incorporated town of the commonwealth and consists of a road, street or highway of such municipality and subject to its control and for the maintenance of which it is responsible, the enactment of said statute does not divest such municipality of such control and responsibility as theretofore rested upon it, and that as to such portion of the state highway, improvement thereof, as part of the state highway, can only be made by the state highway commissioner with the consent of the municipal authorities.

If this conclusion be correct it remains to inquire whether or not the bridge and portion of road brought before us in the pending proceeding was of such character that, before the enactment of said statute, and before the taking over thereof by the state, it was subject to the control of the proper authorities of the borough of Butler, who were also responsible for its maintenance.

As the evidence discloses, route No. 72, designated by said act of assembly, extended from the city line of the city of Pittsburgh into the borough of Butler. This description of this

route was no doubt intended to cover the whole length of road theretofore owned and controlled by the Allegheny and Butler Plank Road Company and known as the Pittsburgh and Butler Plank road, extending from the city of Pittsburgh, not only to, but into the borough of Butler. The deed of conveyance by which said Plank road with all the franchises owned by said company was conveyed to the state highway department describes the route as extending to the end of Main street in the said borough of Butler. As we understand it, the charter of the Plank Road Company gave it authority to construct said road to what was then the south borough line of Butler borough, which point is coterminus with the southern end of the pavement of Main street. Beyond that point southward the borough exercised and could exercise no control for the reason that the bridge and portion of the Plank road, extending southward from that point, was the exclusive property of the private corporation which owned it. The fact that the boundaries of the borough were at a later day extended southward so as to include said bridge and a portion of said road did not divest the corporation owning it of its interest therein or title thereto. So long therefore as the ownership remained in the Plank Road Company, the borough of Butler had no responsibility for the maintenance except in case of abandonment of its franchise by the owning company or by virtue of condemnation proceedings and payment of the value thereof, it had become a public highway and was no longer a toll road. The latest expression of the status of such a road is found in the act of assembly of April 25, 1907, P. L. 104, wherein it is provided "that when any turnpike or part thereof, has been or may hereafter be, appropriated or condemned for public use, free of tolls, under any existing laws and the assessment of damages therefor shall have been paid by the proper county or when any turnpike company or association has heretofore abandoned or may hereafter abandon its turnpike or any part thereof, or when any turnpike company or association, owning any turnpike, has heretofore been dissolved or may hereafter be dissolved by proceedings under any existing laws of this commonwealth, such turnpike, or part thereof, shall be properly repaired

and maintained at the expense of the county, city or borough in which the said turnpike, or part thereof, lies, or the same may be improved, under any existing laws, by the said county, city or borough." In the pending case the Plank road was neither abandoned nor condemned, but with all its property and franchises was conveyed by the proper owners thereof to the state highway department of the commonwealth. It does not, therefore, fall within either of the classes mentioned in said act of assembly by virtue of which the care and maintenance thereof would be cast upon the municipality, and in this respect it differs from a state road or highway, which prior to being taken over by the state was subject to municipal authority and control. In the latter case the local control continued with its consequent responsibility until such time as the state highway department might choose to take it over and improve it.

Under the provisions of said act of May 31, 1911, *supra*, we do not think it was the purpose of the legislature in any case to leave in doubt the question of responsibility for the maintenance of those routes which thereafter should constitute the state highways of the commonwealth, and certainly it was not its purpose to subject them to any double control, which would be against public policy. In the case of *Francis v. Franklin Twp.*, 179 Pa. 195, an action was brought by one who had been injured in consequence of being thrown over an approach to a county bridge, which was left unguarded, suit was brought against the township. The defense set up was that inasmuch as the approach to a county bridge was a part of the bridge itself, the county alone was responsible for its proper maintenance. On the other hand, it was contended that because the bridge with its approaches constituted a part of the highway, the township within which it was located was equally responsible with the county. The verdict in favor of the plaintiff was reversed by the Supreme Court on appeal, and the court, in disposing of the question at issue, said: "We are clear there was no legislative intention to impose upon the county and township exactly the same duty, involving the exercise of watchfulness and discretion on the part of both, and a joint or several responsibility for the consequence of neglect; a duty,

too, affecting vitally the interests of the public and which naturally would lead to confusion and cross purposes in performance, or what is more probable, to neglect by both. Such a construction is repugnant to reason and opposed to public policy." In this connection we may repeat the provision of section 6 of the act of May 31, 1911, hereinbefore quoted, as follows: "After the adoption of this act, all those certain existing public roads, highways, turnpikes and toll roads or any parts of portions thereof subject to the provisions hereinafter made in the case of turnpikes and toll roads . . . shall be rebuilt, constructed, repaired and maintained by and at the sole expense of the commonwealth and shall be under the exclusive authority and jurisdiction of the state highway department." Nothing, we think, would relieve the commonwealth of the duty thus imposed in respect to the state highway known as route No. 72, except it were shown that part of the route lying within the limits of Butler borough was, before being taken over by the state, subject to the control and authority of the borough council, and that the borough was responsible for its maintenance, Inasmuch, however, as it ever was subject to such control, and as no such responsibility therefor existed, we are of opinion that no such authority was created or responsibility placed by virtue of any provision of said act of May 31, 1911, and in the absence of any such newly created authority or responsibility, the borough of Butler cannot be held to the maintenance of that portion of the route lying within its borders. For these reasons the pending rule is discharged.

In re: State Highways.

Street railway tracks—State Highways—Act of May 31, 1911, P. L. 468.

Opinion by Bell, Attorney-General, December 2, 1913, to State Highway Department:

This department is in receipt of your letter of November 21,

1913, enclosing the correspondence with the Central Pennsylvania Traction Company, and printed copy of regulations adopted by your department, governing the erection of poles and the laying of conduits and pipes upon, or in, State highways or State-aid highways.

It appears from the correspondence that the Central Pennsylvania Traction Company desired to raise its tracks where the same run along State Highway No. 140; that permission was requested by the president of that company from your department to raise the tracks; that you advised him that it was necessary that an agreement be signed and a permit given before the work could be done; that an agreement was prepared by your department and submitted to the railway company, which objected to certain provisions thereof, and that before the form of the agreement had been agreed upon, the company, without any agreement or permit, proceeded to re-lay their ties and rails.

It is not clear from the correspondence whether the railway is upon the State highway, or only parallel with it, nor is it clear whether, in addition to laying tracks and ties, the railway company has erected poles.

Assuming that the railway has been laid within the lines of the State highway, I think that it was illegal for the railway company to have gone ahead with the work without your permission, whether the work included the erection of poles concerning which your department has general regulations, or only the laying of tracks concerning which your department has no general regulations.

Section 6, of the State Highway Act of 31 May, 1911, P. L. 468, provides that the roads which are therein designated as State highways "shall be under the exclusive authority and jurisdiction of the State Highway Department, and Section 17 of the same act provides that "no railroad or street railway shall hereafter be constructed upon any State highway . . . except under such conditions, restrictions and regulations as may be prescribed by the State Highway Department."

I advise that mandatory proceedings be instituted.

Commonwealth vs. Mars Borough.**Boroughs—Sewers—Public Waters—Act 1905, P. L. 260.**

Any municipality permitting excrementitious or other discharges from the bodies of human beings to flow into the waters of the state, without a permit duly granted to do so, is maintaining a nuisance under the Act of April 22, 1905, P. L. 260, and the continuance may be enjoined by a court of equity.

C. P. Butler Co., In Equity, No. 4, March Term, 1913.

Opinion by Galbreath, P. J., December 31, 1913:

Mars was incorporated March 23, 1895. Being without a system of sanitary sewers the municipal authorities of said borough, on July 24, 1908, made application to the state department of health under the act of April 22, 1905, P. L. 260, for leave to construct a system of sanitary sewers in the borough and to discharge the sewage into Breakneck creek, which flows through said borough, and setting forth that bond issue of \$10,000 had been voted for that purpose. On April 15, 1909, a decree was issued by authority of the governor, attorney-general and commissioner of health of the commonwealth approving the proposed system "as soon as the borough shall have prepared the plans for a sewage disposal plant and a connecting sewer, and that this approval shall not be given until the plans for the sewage disposal works and the sewers are satisfactory in every particular to the state department of health, and until the borough can and shall either directly or indirectly bring about the construction of a sewage disposal works and the treatement of the sewage of the town," and "that discharge of raw sewage into Breakneck creek or its tributaries cannot be approved."

On March 25, 1910, the borough authorities submitted to the department of health plans for the construction of a sewage disposal works in connection with the proposed sewer system, which were approved May 31, 1910, on condition, inter alia, that "no sewage whatsoever shall be discharged from said sewer system into the waters of the state. The sew-

age shall be delivered to a sewage purification plant and therein be subjected to treatment and be purified and rendered satisfactory to the state department of health," and that "the discharge of raw sewage into Breakneck creek or its tributaries cannot be approved," which decree was accepted by the authorities of the borough and recorded in the office of the recorder of deeds in and for Butler county on July 20, 1910.

On Sept. 29, 1910, the borough authorities submitted to the state department of health plans for a sewage disposal works in conformity with the terms of the permit of May 31, 1910, which plans were approved Nov. 18, 1910, subject, *inter alia*, to the condition that the permit of May 31, 1910, be and remain in full force, and that "the discharge of sewage from the sewer system into the waters of the state from the sewer system or sewage disposal works from the borough is prohibited." This permit was also accepted by the borough authorities and recorded in the recorder's office, aforesaid, April 16, 1912.

No appeal was taken from any of said decrees to the common pleas court of Butler county under the provisions of said act of April 22, 1905, section 11.

The said act provides, in section 4 thereof, that "no person, corporation or municipality shall place or permit to be placed, discharge or permit to flow into any of the waters of the state, any sewage except as hereinafter provided." That is, pursuant to a permit and on the conditions imposed by the governor, attorney-general and commissioner of health of the state. This act was passed, as its title indicates, "to preserve the purity of the waters of the state, for the protection of the public health." The term "waters of the state," under the provisions of the act, includes "all streams and springs and all bodies of surface and of ground water, whether natural or artificial within the boundaries of the state." As was said by the Supreme Court, in *Com. v. Kennedy*, 240 Pa. 214, "This does not make all such streams public streams, but it does subject them to public control, because, while not public streams, they are susceptible of being turned into public nuisances."

In the case in hand the supervisory power of the state was exercised through the permits granted and conditions imposed.

on the defendant municipality in the several orders and decrees issued by the proper officers of the state. These having been duly recorded and unappealed from became operative from the date of record.

It is to be observed that in none of the decrees so issued, is permission given to the defendant borough to discharge raw sewage into Breakneck creek. On the contrary such permission is expressly withheld. That the defendant municipality has been discharging sewage through its sewer system and the drain connected therewith, into Breakneck creek, a part of the waters of the state, is beyond controversy. In doing so, however, it contends that it is not thereby creating a public nuisance, and that in any event the present state of its indebtedness is such that it cannot be increased in sufficient amount to construct a sewage disposal plant without exceeding the constitutional limit.

The first of these contentions cannot be sustained. Whether the facts in evidence are sufficient to establish the existence of a common law nuisance is not the question to be determined. The unauthorized discharge of sewage into the waters of the state has been prohibited by the state in the exercise of its police power, from which it results that any violation of the statutory prohibition is a public nuisance. In the case of *Com. v. Kennedy*, *supra.*, the Supreme Court says that, "Because the public health is endangered by drainage of sewage into any flowing stream, the legislature has denounced it as an offense on the part of anyone permitting it. In no more positive way could it be declared a public nuisance."

And even aside from the statute we think the facts in evidence are sufficient to establish a public nuisance at common law. The tests made of the sewage being discharged into the creek and of the waters of the stream at various points below the point of discharge, reveal the presence of bacteria in very large numbers, ranging as high as three million two hundred thousand of all kinds, with nine hundred thousand of the colon bacilli per cubic centimeter. In the light of present-day knowledge, it requires no flight of imagination to believe that the sending forth of such a stream laden with all its dangerous

possibilities through inhabited communities and in turn to become tributary to larger streams, flowing by and through still other communities, in the very nature of the case, creates a public nuisance. The argument that the natural flow of the water will, within a few miles purge itself of its deleterious character, does not rest upon that accurate test which would, under all circumstances, make it a safe working hypothesis. The volume of water carried by the stream, the rapidity of its flow and many other circumstances, it may well be believed, would tend to modify or defeat the theory so advanced.

It clearly appearing that the defendant borough in discharging the sewage from its sewer system into Breakneck creek, is doing that which has been prohibited by law and is a public nuisance; it follows that a court of equity may put forth its hand to prevent threatened injury. *Hill v. Commissioners, I Parson's Select Equity Cases 501; Com. v. Rush, 14 Pa. 186.*

This conclusion renders it unnecessary to consider or decide the question whether a municipality can justify the continued maintenance of a public nuisance of the kind therein complained about on the ground of its inability to abate it by the construction of a sewage disposal plant without transgressing the constitutional limit of indebtedness. The limit of indebtedness imposed by the Constitution on municipalities does not exempt them from liability for wrongful and tortuous acts, which may result in an increase of municipal indebtedness beyond the limit so fixed, but it does prohibit and prevent voluntary assumption or creation of any debt in excess of that limit. It would seem that the voluntary character of the municipal act, whereby the debt is increased beyond the constitutional limit, is the thing which offends against the constitutional prohibition. *Keller v. Scranton, 200 Pa. 130.* In view of the provision of Art. XVI, Sec. 3, of the Constitution, that "the exercise of the police power of the state shall never be abridged," it may be that the municipality would not be exempt from liability growing out of the mandatory requirements of the state's exercise of its police power in order to preserve the public health and welfare. But the disposition of the case before the court does not require the determination of that question. It is clear that the

borough of Mars is maintaining a public nuisance. The right of the public to be protected against the results of its continuance is equally clear. From these two facts results the court's duty to restrain the wrongful and thus prevent its threatened consequences. And even if it were true that said borough cannot lawfully expend the money necessary to remove the offending cause by the construction of a sewage plant, the result will be that it will fall back into the more primitive methods of caring for its sewage, which prevailed before any sewage system was constructed, unless it shall be able to make some temporary arrangement satisfactory to the health authorities of the state for the purification of its sewage, until such time as its financial situation will enable it to construct a satisfactory disposal plant. To go back to former conditions would doubtless entail much inconvenience upon the residents of the borough whose toilet rooms are connected with the public sewer. But individual annoyance and inconvenience when balanced against the health and welfare of the larger community, represented by the commonwealth, must give way in order to the greater good. In order, however, that unnecessary hardship may be avoided, a reasonable period of time should be given in order to the adjustments which will necessarily follow the restraining order of the court.

The contention of the part of defendant's counsel that the court in this proceeding may modify the decree of the department of health or set it aside as though the matter were now being heard on appeal, as provided by the act of assembly, cannot, we think, be sustained. We are not convinced that the court should now and in this proceeding, instituted by the commonwealth, modify or set aside the decrees or any of them issued by the proper authorities of the state as though appeals therefrom had been taken by the borough defendant. Nor, indeed, if the authority to do so were clear, would it seem that any ground exists for such action in view of the reasonable character of the requirements and conditions imposed.

CONCLUSIONS OF LAW.

First. Any municipality placing or permitting to be placed, or discharging or permitting to flow into any of the waters of this

state any substance containing any of the waste products or excrementitious or other discharges from the bodies of human beings without a permit authorizing it so to do, duly granted by the commissioner of health, pursuant to the unanimous opinion of the governor, the attorney-general and the commissioner of health, is maintaining a nuisance per se by reason of the provisions of the act of April 22, 1905, P. L. 260, and is committing an act contrary to law and prejudicial to the interests of the community, the continuance of which may be enjoined by a court of equity.

Second. Under the facts proven in this case, the borough by placing or permitting to be placed, and by discharging or permitting to flow into Breakneck creek, substances containing the waste products and excrementitious or other discharges from the bodies of human beings, is making said Breakneck creek a public nuisance, and should be restrained from continuing said nuisance.

Third. The defendant borough of Mars, having obtained permission to build the sanitary sewer system in question through the representation upon its part that a sewage disposal plant would be built for the purification of the sewage, should be enjoined from permitting any sewage, as defined by said act of April 22, 1905, P. L. 260, to be collected in, or discharged through, said sewer system until said disposal plant has been built and approved by the state department of health or until such time as such other arrangement for the purification of said sewage shall be made as will be satisfactory to the state department of health until said sewage plant can be constructed. In order, however, that no unnecessary hardship may be imposed upon individuals now discharging sewage through the sewers of the borough into the waters of the state, such restraining order should not become operative until a reasonable period has intervened, during which the necessary readjustments may be made.

Fourth. The costs hereof should be paid by the defendant.

Gallup vs. Port Alleghany Borough.**Boroughs—Sidewalks—Nuisances.**

The width of sidewalks need not be uniform throughout their length, nor need the same width be established for each side. To restrain in equity a private person must show special injury.

C. P. McKean Co. In Equity, No. 3, June Term, 1912.

F. D. Lewis, Gallup & Shattuck, for plaintiff.

P. L. Tyler, Jones & Lewis, for defendant.

Opinion by Bouton, P. J., January 7th, 1914:

The plaintiff, T. T. Gallup, being the owner and occupant of certain premises at the corner of Maple and Pine streets and abutting on the north side of Maple street in the borough of Port Alleghany, brings his bill and asks the court to restrain the defendant from continuing to permit or allow the maintenance of a sidewalk on the south side of Maple street between Main street and Pine street on any other line than that established by a certain ordinance of said borough of Port Alleghany, to wit, ordinance No. 67, which provides that "the distance from the lot lines to the gutter lines shall be not less than eight feet, of which distance one foot next lot line is vacant; the next four feet toward the center of the street shall be used for sidewalk purposes, and the next three feet toward center of the street shall be used for tree line."

The complainant further prays in his bill that a certain proposed ordinance, Exhibit A, attached to the bill be declared special legislation. The said proposed ordinance, Exhibit A, enacts, "that the north line of sidewalk on the south side of Maple street between Pine street and Main street shall be eighteen feet, six inches from the center of said Maple street."

The parties to this action stipulated that a certain petition wherein the plaintiff in this case and others on or about July 11, 1904, requested the borough authorities to remove certain obstructions, to wit, buildings, sidewalks and other obstructions from Maple street, so that the full street might be

for public use, might be filed as evidence, and on May 16, 1912, the following stipulation was filed: "Now, to wit, May 16, 1912, plaintiff admits the allegations contained in the twelfth paragraph of defendant's answer, and that the sidewalk on the south side of Maple street between Main and Pine streets has been constructed, maintained, repaired and reconstructed upon its present location for a long period of years since the plaintiff acquired the property described in the first paragraph of his bill, and the shade trees have been planted and have grown to maturity between the said sidewalk and the centre line of said street. The said trees being located about nine feet toward the center of the street from the edge of the said sidewalk. .

"It is further mutually stipulated and agreed that the above suit be submitted upon the bill, answer, and the stipulations."

The defendant admits the first, second, third, fourth, fifth, sixth and seventh paragraphs of the plaintiff's bill. Also admits that the ordinance attached to the plaintiff's bill and marked Exhibit A, was duly and regularly passed over the veto of the burgess on May 6, 1912, and that it is intended to be immediately published and transcribed. Except as above admitted the defendant denies the allegations contained in the eighth paragraph of plaintiff's bill.

Defendant also admits that it is about to construct a cement crosswalk across Willow street in line with the sidewalk existing on the south side of Maple street between Main and Pine streets, and except as above admitted, denies the allegations contained in the ninth paragraph of plaintiff's bill; defendant denies the statements contained in the tenth and eleventh paragraph of plaintiff's bill.

The defendant further answering says, that there is now and will be ample room in the cartway of Maple street between Main and Pine for all the traffic upon the said portion of Maple street at the present time, or which is likely to develop in the future.

We find such facts as are stated in the plaintiff's bill admitted or not denied by defendant's answer, and we deem the findings of further facts unnecessary for a proper disposition of this case.

On the part of the defendant we have been asked to state certain conclusions of law, which requests, together with our answers thereto are as follows:

1 Under the undisputed facts in this case, the bill should be dismissed at the cost of the plaintiff. A. We affirm this request.

2. The sidewalk in question is not a nuisance. A. We affirm this request.

3. The plaintiff has not shown any injury special to himself or otherwise, and therefore is not entitled to an injunction. A. We affirm this request.

4. An ordinance fixing the location of a sidewalk on one side of a street four rods in width for a distance of two blocks at eighteen and one-half feet from the center of the street is not illegal as special legislation. A. We affirm this request.

5. Ordinances of a ministerial character are not required to be general in their terms, but may be particular. A. We affirm this request.

6. Under the facts in this case, the plaintiff is guilty of laches. A. This request is refused.

From the undisputed facts in this case, it appears that at the point in question the sidewalk has been constructed and maintained upon its present location for a long period of years, since the plaintiff acquired the property described in the bill, which is on the opposite side of Maple street from the said sidewalk, and that shade trees have been planted and have grown to maturity between the said walk and the center line of the street, the said trees being located about nine feet toward the center of the street from the edge of the sidewalk, and that the ordinance attached to the plaintiff's bill was passed, not for the purpose of changing the location of the sidewalk upon the ground as now constructed and maintained, but for the purpose of legalizing such location. The plaintiff urges that such ordinance is void as special legislation. With this contention we cannot agree. We know no authority which holds that the borough authorities are bound to make the location of sidewalks the same for the entire length of any street.

We see no reason why the distance of the sidewalk from the property line must be the same on both sides of a street, neither

do we see any reason why the location from the property line must be the same for the entire length of the street.

The plaintiff has failed to aver or prove how he is specially injured by the action of the borough authorities legally locating the sidewalk where it is now constructed, and in order to successfully invoke the aid of the court it is incumbent upon him to aver and prove that the sidewalk in question is a nuisance, and that he has been specially injured. The authorities uniformly hold that private persons seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to themselves, aside from and independent of the general injury to the public. In this case there is no showing whatever that the public are injured in any particular. Neither is there any showing that the plaintiff has or will suffer any special injury.

For the reasons above given, the plaintiff's bill should be dismissed.

DECREE.

And now, to wit, Jan. 7, 1914, this cause came to be heard and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

That the plaintiff's bill be and the same is hereby dismissed at the costs of the plaintiff.

The prothonotary will enter the above decree nisi, subject to exceptions sec. reg.

Commonwealth ex rel. Riley vs. Durkin, et al.

Boroughs—Councilmen—Defective Ballots.

An official ballot is defective if it fails to specify the terms of councilmen to be elected to fill unexpired terms. The Act of 1911, P. L. 1047 (amended in 1913, P. L. 268) does not repeal the Act of 1895, P. L. 109.

C. P. Luzerne Co., No. 519, February Term, 1914.

E. E. Jones and M. F. McDonald, for relators.

J. T. Lenahan, and T. F. Farrell, for respondents.

Opinion by Woodward, J., January 25, 1914:

The quo warranto in this case is sought to oust the defendants from the office of borough councilmen of Sugar Notch on the ground that the election of November, 4, 1913, by which they claim title to the office, was void because the official ballot did not specify that four of the twelve councilmen voted for were running to fill unexpired terms of two years, but contained the names of twelve candidates without designation of terms.

The suggestion was filed on January 6, 1914. The writ was allowed on the same day and made returnable January 19, 1914.

On January 8, 1914, the defendants, by their counsel, filed a demurrer to the suggestion and agreed with plaintiff's counsel to submit the case to the Court for argument on the demurrer on Saturday, January 10, 1914, at 10 a. m., at which time the case was fully argued and briefs submitted by counsel on both sides.

At a later date counsel submitted supplemental briefs and further argument was heard.

The facts stated in the suggestion, and admitted by the demurrer, are these:

Sugar Notch is a borough of Luzerne county, not divided into wards, and subject to the general borough Act of April 3, 1851, P. L. 320.

Section 1 of the Act of June 19, 1911, P. L. 1047, provides, *inter alia*, as follows:

"In all boroughs of this Commonwealth, not divided into wards, the qualified voters shall on the first Tuesday following the first Monday of November, 1911, meet to elect for the term of four years, as many councilmen as under the provisions of the existing law or under the provisions of the charters of the respective boroughs would have been required to have been elected as successors to councilmen whose terms would have expired upon the first Monday of March, 1911, had the same not been affected by the constitutional amendment and the schedule for the amendment ratified or approved by the people of this Commonwealth at the November election of 1910."

That under the provisions of the then existing law there were three councilmen to be elected in the borough of Sugar Notch on

the first Tuesday after the first Monday of November, 1911, which was the seventh day of November in that year, as successors to councilmen whose terms of office would have expired upon the first Monday of March, 1911, but by the constitutional amendment and the schedule therefor were extended until the first Monday of January, 1912.

That on November 7, 1911, the voters of the borough of Sugar Notch did elect three councilmen, to wit: John Boyle, Frank Lenahan, and Moses Jones, for the term of four years from the first Monday of January, 1912.

That the next election in the borough of Sugar Notch was held on November 4, 1913, and that in the interval between the election of 1911 and that of 1913, John Boyle and Frank Lenahan, two of the three councilmen elected in 1911, died, and John J. Kane and Patrick M. Lenahan were respectively appointed by the borough council to fill these vacancies until the election of 1913, so that at the time of the election of November 4, 1913, the town council consisted of Peter Garvey, Michael H. Lenahan, Bolif Miskiel, Peter Siedlecki, Moses Jones, and John J. Kane, and Patrick M. Lenahan, the last two by appointment to fill vacancies caused by death.

Section 3, of the Act of June 19, 1911, provides that "In all boroughs of this Commonwealth not divided into wards, the qualified voters shall on the first Tuesday following the first Monday of November, 1913, meet to elect as many councilmen as the said boroughs may be respectively entitled to, less, however, the number in the respective boroughs elected upon the first Tuesday following the first Monday of November, 1911." So that at the general election held in the borough on November 4, 1913, which was the first Tuesday after the first Monday in November, 1913, there were six of the councilmen to be elected; (a) four under Section 3 of the Act of June 19, 1911, just cited; (b) and two for the term of two years to fill the unexpired term of John Boyle and Frank Lenahan, which terms would expire of the first Monday of January, 1916.

At the general election on November 4, 1913, there were twelve candidates for the office of council, and of these twelve the six

receiving the highest number of votes were Thomas Durkin, Isaac Gallagher, Thomas Lenahan and Andrew Mathews, who are the defendants named in this suggestion, and Peter Garvey and Patrick M. Lenahan, the vote being very close, the highest number of votes cast for any of the twelve being 206, and the lowest 195.

The official ballot, however, used at the election did not designate any terms, and the returns of election did not show any votes for a two-year term for councilman in said borough. These statements in the suggestion, insofar as they are statements of fact, are admitted by the demurrer, but if there are any conclusions of law, the demurrer does not have that legal effect.

The relator avers that the ballot used at the election was defective and void in that there was no designation thereon of the terms for the councilmen who were to fill vacancies, and claims that the election was void because of this defect in the official ballot. He asks that the four defendants, who were the ones receiving the highest votes at the election, be ousted from their offices.

In that case the borough would be governed for the next two years by a council composed of seven men: (1) Moses Jones, elected in 1911, for four years, beginning January 1, 1912, whose term expires January 1, 1916; (2) John J. Kane and Patrick M. Lenahan, appointed by the council to fill the vacancies caused by the deaths of John Boyle and Frank Lenahan, two of the three elected for four years in 1911, who died before the election of 1913; and (3) the other four councilmen in office at the time of the election in 1911, whose terms would have expired in 1913, if there had been a valid election in that year, all of whom hold over by virtue of the provisions of the nineteenth section of the Act of April, 3 1851, P. L. 320, which provides "that the officers elected shall serve until others are du'y elected and qualified."

The demurrer, admitting the facts as suggested, claims that the election of the defendants was legal and valid, notwithstanding the absence of any designation for the two-year terms on the official ballot, because the Act of June 19, 1911, P. L. 1047, as amended by the Act of May 20, 1913, P. L. 268, took from the electors the right to designate the terms of candidates for the

office of councilmen at the election of November 4, 1913, and transferred the right and imposed the duty upon councils of designating the terms of all the councilmen elected by the method prescribed in said statute, to wit, by lot.

There is no dispute about the facts in the case. The question is whether the provision in the Act of 1911, as amended by the Act of 1913, for a drawing by lot for the short and long terms applies to a case like this where the only short terms to be filled arose from the death of two of the three councilmen elected for four years at the election of 1911, whose places had to be filled for their unexpired terms at the election of 1913.

There are two obstacles to such a construction of the Act.

First. Neither the Act of 1911, nor its amendment of 1913, provides for any election to fill vacancies caused by death, resignation or removal; and

Second. The Act of 1911 in the third section expressly limits the election held in 1913 to four candidates.

I.

The provision for filling vacancies in the office of borough councilman is found in the Act of 1895, P. L. 109, which has not been wholly repealed by the Act of 1911. Section 6 of the Act of 1911 provides:

"This Act shall apply to every borough in this Commonwealth; whether said borough is now governed by general or special Acts of Assembly; and all Acts or parts of Acts, whether general or special, inconsistent herewith, are hereby repealed;" but this does not repeal the provisions of the Act of 1895, to which we must go to find a method of electing the two councilmen to fill the unexpired terms of those who died. That portion of the Act of 1895 is not only not inconsistent but necessary to meet a case like this. The two Acts must be read together. The fourth section of the Act of 1895 reads as follows:

"Section 4. That the members of town councils shall have power to fill any vacancy which may occur therein by death, resignation, removal from the borough, or otherwise, until the next annual election for members of town council, when such

vacancy shall be filled by electing a qualified citizen to supply the same for the balance of the unexpired term: Provided, that the qualified voters shall designate on their ballots that the person or persons thereon named are voted for to fill an unexpired term."

The proviso in this section requires a designation on the ballot that the persons thereon named are voted for to fill unexpired terms, which was not done in the Sugar Notch election on November 4, 1913.

The official ballot for this election should have had printed on it the names of eight candidates without designation of terms, from which the electors would have voted for four under the provisions of the Act of 1911, which provided specifically for the election of only four at that particular election, and the names of four candidates designating that two of these were to be voted for to fill unexpired terms. The election of six councilmen in this way could not have been successfully attacked and there would have been no occasion for a drawing by lot of short and long terms.

II.

The provision for a drawing of terms by lot could not operate in this election because the Act of 1911, containing that provision, limited the number to be elected to four and these four were all to be elected for the same term of four years. Section 3 provides that the voters shall meet on November 4, 1913, to elect as many councilmen as the borough is entitled to, less the number elected on November 7, 1911. The borough is entitled to seven, and three were elected in 1911, so that the remainder, or four, are all that could have been elected on November 4, 1913. The legislature could not have contemplated a drawing by lot among six when only four were to be elected.

The result of this decision will be to invalidate the election of 1913, so that the old councilmen will hold over until their successors are elected in 1915, and the council will be made up of one councilman elected in 1911 for four years, two appointed to fill vacancies of dead councilmen, whose terms expire in January, 1916, and four councilmen whose terms would have expired in

January, 1914, but who hold over until their successors are elected at the next election in 1915.

The Court has taxed its ingenuity in vain to avoid this result, because it defeats the expressed choice of the people, and because it will result in the election of the whole body of seven councilmen in 1915, all for four-year terms, and there will not be that equal division into classes provided by the new law.

Counsel for the respondents have asked us to read into the third section of the Act the words "then serving," so that the provision for the number of councilmen to be elected at the November election in 1913 shall read:

"In all boroughs of this Commonwealth not divided into wards . . . the qualified voters shall on the first Tuesday following the first Monday of November, 1913, meet to elect as many councilmen as the said borough may be respectively entitled to, less, however, the number in the respective boroughs . . . elected upon the first Tuesday following the first Monday of November, 1911, then serving."

But this is beyond our power. The Legislature is presumed to have acted with full knowledge of prior legislation on the same subject. 36 Cyc. 1135.

When they passed the Act of 1911, they are presumed to have had in mind the Act of 1895, which prescribes that the election to fill unexpired terms must be by a ballot setting forth that fact. They made no provision for any method to take its place. We cannot legislate for them, and by the interpolation of words supply such a method.

"In the construction of statutes it may sometimes become necessary to transpose words or even to supply or strike out a word which the context shows was omitted or inserted by mistake. Instances are not lacking in the reports where this has been done in order to effectuate the intention of the Legislature. But when an enactment is plain and sensible, and, according to any meaning broad or narrow, popular or technical, which may be ascribed to the words, does not apply to the case in hand, it is not permissible for the Courts to add or omit words in order to make it so apply, even though it may be clear to them that the case is as fully within the mischief to be remedied as the cases

provided for. This would be not to construe but to amend the law, which is within the exclusive province of the Legislature." *Commonwealth v. Gouger*, 21 Sup. Ct., at 229.

"It is a rule for which there is an abundance of authority that the mere fact that a certain construction of a statute will cause inconvenience or failure of justice will not affect the judicial determination of a case involving such construction. But where the proper construction of a statute is otherwise doubtful, arguments from the inconvenience, absurdity, injustice or prejudice to the public interests resulting from a proposed construction may be considered." 36 Cyc. 1111 and 1112.

There is nothing doubtful or ambiguous about the language of the Act of 1911. It is clear as far as it goes. The trouble is it does not go far enough to include an election to fill unexpired terms, and we cannot extend it by supplying language that the Legislature did not use.

The possible results of holding that the Act of 1895 was repealed by the Act of 1911 might be worse than the present situation, for if four of the council, made up as the respondents would have us hold, should die, resign, or remove from the borough before the next election, there would be no provision for filling their places, and the council would lack a quorum for the transaction of business.

This view of the case makes it unnecessary to consider the constitutionality of the Act of 1911 at this time.

The demurrer raises the whole question, so that final judgment can be entered on the pleadings.

And now, January 25, 1914, it is adjudged that the election held for the choice of councilmen in the borough of Sugar Notch, on Tuesday, November 4, 1913, which was the first Tuesday following the first Monday of November in that year, was void for the reasons alleged in the suggestion filed in this case; and the defendants, Thomas Durkin, Isaac Gallagher, Thomas Lenahan, and Andrew Matthews, were not elected councilmen of said borough; that judgment be entered in favor of the Commonwealth, and that said defendants be ousted and altogether excluded from said offices.

Borough of Hanover's Petition. No. 2.

**Boroughs—Sewers, Acquiring of—Rights of Mortgagee—
Indebtedness—Ordinances—Appropriations.**

The Trustee under a mortgage has no right to be made a party to proceedings to assess damages sustained by a sewer company proposed to be taken by a borough.

The ordinance may be passed and approved on the same day.

Prior to the confirmation of the viewers' report, it is not necessary that money be actually appropriated for the payment of the property proposed to be taken. Necessary parts of the sewer system outside of the borough may be taken by the borough as part of the entire system.

C. P. York Co., Exceptions to viewers' report.

R. E. Cochran and W. U. Hensel, for exceptions.

T. F. Chrostwaite and John L. Rouse, for report.

Opinion by Ross, J., January 5, 1914:

On May 13th, 1912, the Borough of Hanover, filed its petition praying for the appointment of three discreet and disinterested freeholders as viewers to ascertain the amount to be paid for the said property of the said Sewer Company in the manner prescribed under the Act of General Assembly of the Commonwealth of Pennsylvania approved the 16th day of May, 1891, P. L. 75. At the request of the counsel representing the Hanover Sewer Company, a rule was granted on the Sewer Company to show cause why the viewers should not be appointed as prayed for. The rule was answered and testimony was taken, and all objections made by the Hanover Sewer Company to the appointment of viewers were regularly argued pro and con before the Court.

On January 27th, 1913, this Court discharged the rule granted, overruled the objections interposed, and appointed viewers as prayed for; filing an opinion at the same time, which will be found reported in 26 York Legal Record page 153.

On August 4th, 1913, the viewers so appointed presented a

report, and the following order, as directed by the Court, was made upon the back of said report:

"And now, to wit, August 4, 1913, the within report is ordered to be filed and confirmed nisi and the Prothonotary is directed to give notice of said filing by publication by one insertion, in the Hanover Record Herald, and the schedule of damages contained therein; which notice shall also state that unless exceptions are filed to said report within thirty days from said date of filing the same will be confirmed absolutely."

On September 2nd, 1913, proofs of notice and publication as directed by the Court were regularly filed in open Court. The same day, the following exceptions were filed by the Real Estate Trust Company of Philadelphia, Trustee under a mortgage to secure bonds, &c.:

(1) "The exceptant received no notice of the petition praying for the appointment of viewers or of the rule granted to show cause why the same should not be appointed, or of the argument upon said rule, or of the appointment of said viewers, or of the time and place when and where the said viewers met for the purpose of viewing the premises and examining the property, or of any subsequent meeting of said viewers.

(2) "The exceptant, being a party interested as above shown, was given no opportunity to be heard by the viewers by itself or by its witnesses.

(3) "The exceptant was given no notice of the preparation by the viewers of the schedule prepared by them of damages and benefits, or of a time and place where said viewers would meet and exhibit said schedule and hear all exceptions thereto and evidence.

(4) "The ordinance approved April 26, 1912, No. 213, of the Borough of Hanover, under which said viewers were appointed, is illegal and invalid and gave no authority in law for the condemnation of the property of the Hanover Sewer Company at the instance of said Borough.

(5) "The Act of April 19, 1901, P. L. 82, which is referred to in the second section of said ordinance, under the authority of which all the sewers, conduits and pipes with the necessary inlets and appliances for under surface and sewage drainage now

owned by the Hanover Sewer Company were thereby attempted to be acquired, appropriated and adopted by the said Borough of Hanover as part of said sewerage system of said Borough, is unconstitutional and invalid in that the title thereof does not give proper notice of the contents of the same.

(6) "The Act of June 15, 1911, P. L. 971, referred to in the sixth section of said ordinance, and under the provisions of which said ordinance purports to have been enacted, has no reference to and does not include any such condition as exists in Hanover where a partial sewerage system has already been instituted and established by the Hanover Sewer Company.

(7) "The said Act of June 15, 1911, P. L. 971, does not contemplate, include or relate to the acquisition of a plant already constructed and operated by the Company and paid for by the assessment of benefits on the front foot basis, because the act is simply to provide a system whereby the borough may be able to build sewers, not to condemn, adopt or acquire sewers already built by private corporations.

(8) "Said ordinance of said Borough is invalid in that it was introduced and passed on the same day, to wit, April 26, 1912.

(9) "Because it does not appear that the municipal authorities of the Borough of Hanover ever gave expression, by ordinance or vote, of the desire of said Borough for the acquisition and condemnation of any property of the Hanover Sewer Company before the enactment of the ordinance to acquire same and to borrow the money necessary to pay for the same.

(10) "The said ordinance No. 213 of the Borough of Hanover, enacted April 26, 1912, is not sufficiently broad in scope to support the petition of the Borough of Hanover purporting to have been filed in pursuance of said ordinance, in that in and by said ordinance it was 'ordained that all sewers, conduits and pipes with the necessary inlets and appliances for under surface and sewage drainage now owned by said company, be and the same are hereby acquired, appropriated and adopted by said Borough of Hanover as part of said sewerage system of said Borough, in accordance with the Act of April 19, 1901, P. L. 82,' whereas the petition for the appointment of viewers prays for such appointment for the purpose of ascertaining the amount

to be paid for 'the sewers, conduits and pipes with the necessary inlets and appliances and the property of the Hanover Sewer Company, a corporation of the State of Pennsylvania, upon the following highways of the Borough of . . . in accordance with the Act of Assembly approved April 19th, 1901, P. L. 82.'

(11) "The viewers exceeded the powers given them by their appointment in that they included in their finding property of the Hanover Sewer Company not included in the property designated by the petition as the property of which they were to ascertain the value, to wit, 'the sewage disposal plant of the Company and the ground upon which it is situate.'

(12) "The viewers had no authority in law or in fact to find that the said sewage disposal plant of the Company and the ground upon which it is situate, included by them in their finding as aforesaid, are 'necessary appliances of the Company, indispensably necessary to the operation of the sewerage system.'

(13) "The viewers had no authority under the ordinance upon which their appointment was prayed for and based, to include in their findings the value of the sewage disposal plant of the Company and the ground upon which it is situate.

(14) "The viewers exceeded the authority given them by their appointment in that the petition upon which said appointment was made specifically set forth the alleged desire and intention of the said Borough to become the owner of the sewers, conduits and pipes with the necessary inlets and appliances and the property of the said Company upon certain specifically named highways, and the viewers included in their findings the value of the sewage disposal plant of the Company and the ground upon which it is situate, which said ground appears by said report of viewers not to be located upon any of the highways named in the petition for the appointment thereof.

(15) "The finding of the viewers is vague, uncertain, improper and illegal inasmuch as it finds that the damages "sustained by the said Hanover Sewer Company which we find are \$75,000.00 to be paid to said Company by the Borough of Hanover,' without specifying specifically and in detail the

particular kind and nature of the property included by them in their said finding.

(16) "The report of the viewers is improper and illegal in that it takes the property held by the exceptant in trust for the bond holders under said mortgage or deed of trust without due process of law.

(17) "The report of the viewers is improper and illegal in that it takes the property held by the exceptant in trust for the bond holders under said mortgage or deed of trust without adequate legal compensation therefor.

(18) "The appointment of the viewers is improper, illegal and unwarranted by law in that the petition upon which said appointment is based prays for the appointment of viewers 'to ascertain the amount to be paid for the property of the said Sewer Company' sought to be acquired, appropriated and adopted by the Borough of Hanover, instead of the actual valuation of the same at the time of the taking by the municipality.

(19) "The report of the viewers is improper, illegal and unwarranted by law in that it fails to ascertain, find or specify the 'actual value' of the property sought to be acquired 'at the time of taking by the municipality,' as required by Section One of the Act of Assembly, approved April 19th, 1901, P. L. 82, under which Act said Borough specifically attempted to acquire the property of Hanover Sewer Company specified in Section Two of said ordinance 213 enacted April 26, 1912.

(20) "The Borough of Hanover has no legal right, power or authority to acquire, appropriate and adopt the property of the Hanover Sewer Company sought to be acquired, appropriated and adopted by it, because the said Borough has not the financial ability to pay for the same.

(21) "The Borough of Hanover has no legal right, power or authority to acquire, appropriate and adopt the property of the Hanover Sewer Company sought to be so acquired, appropriated and adopted by it, because no proper provision is made in said ordinance No. 213, under which the Borough seeks to acquire, appropriate and adopt the property of the Hanover Sewer Company therein specified, for raising the money necessary to acquire and pay for the same.

(22) "The said ordinance No. 213, of the Borough of Hanover, enacted April 26, 1912, is beyond the power of the Borough to enact, and the appointment of viewers by virtue thereof and the report of such viewers as filed is illegal and void as being the incurring of a new debt by and an increase of the indebtedness of the Borough of Hanover to an amount exceeding two per centum upon the assessed valuation of the taxable property therein, without the assent of the electors thereof at a public election in such manner as is provided by law.

(23) "The right to file other and additional exceptions is hereby reserved."

The first, second and third of the exceptions are based upon a theory of exceptant that a mortgagee as a trustee creditor, is such a party in interest as requires notice to be given of all proceedings incident and prior to the taking of property under the right of eminent domain.

The proceeding now before us is entirely a statutory one, and the statute invoked by the petition for the appointment of viewers are the Acts of Assembly approved April 19th, 1901, P. L. 82; May 15, 1891, P. L. 75, and June 15th, 1911, P. L. 971.

The last named Act (as we said in our opinion filed January 27th, 1913, 26 York Leg. Rec. 153), was obviously intended to provide a system whereby boroughs may build sewers and pay the costs thereof by issue of bonds, and collect the same from the property benefited, in installments.

The Act of April 19th, 1901, P. L. 82, was expressly passed for the purpose of making it lawful for any municipality in which a corporation, created and existing under and by virtue of the laws of this Commonwealth, have constructed and are maintaining, or may hereafter construct or maintain, sewers, &c., to become the owner of such sewers, &c. The Act of May 16, 1891, P. L. 75, provides the method of appraising and acquiring ownership thereof. "The whole scope of the Act," (of 1891) "shows, as the title indicates, that it is an Act in relation to the construction of sewers and payments of damages, costs and expenses thereof, and hence the parties interested who may file exceptions within the meaning of its terms, are those directly, and not remotely affected by proceedings under it."

A tax payer of a borough, who has no property taken, injured or destroyed, has no power to file exceptions; *Pennsylvania Steel Company's Appeal*, 161 Pa. 574; *Olyphant Borough Sewer, O'Malley's Appeal*, 198 Pa. 534-538.

We are unable to see how the exceptant's rights in this case are higher than a taxpaying resident of the municipality whose property is not taken or injured. In *Jackson v. Pittsburg*, 36 Pa. Super. Ct. 274, it was decided that "in proceedings under the Act of May 16, 1891, P. L. 75, a mortgagee is not entitled to receive actual notice or be made a party to the proceedings, since the mortgagee is not the owner of the land."

This disposes of first, second and third exceptions. They are dismissed.

Exceptions 4, 5 and 6 seem to be a repetition of those interposed against the appointment of viewers, and were fully argued on the rule to show cause why viewers should not be appointed. We then endeavored to dispose of them by our opinion filed January 27, 1913 (26 York Leg. Rec. 153). They are for reasons then given dismissed.

The seventh exception, we think, is answered by the language of the first section of the Act of 1901, which clearly makes it lawful for any municipality, (in which any corporation, created and existing under the laws of this Commonwealth, have constructed and are maintaining . . . sewers, culverts, conduits, &c., &c.) to become the owners of such sewers, &c., &c. We see no merit in this exception; See Act of June 15, 1911, P. L. 971; See Act of May 21, 1913, P. L. 277.

The seventh exception is dismissed.

The eighth and ninth exceptions were fully disposed of in our opinion filed January 27, 1913, 26 York Leg. Rec. 153.

We are still of the opinion that an ordinance of the kind excepted to, is not invalidated because it was introduced and passed upon the same day, if it is in all other respects regular.

Regarding the ninth exception, in addition to reasons given in our opinion before filed, we find that it is not necessary that money be actually appropriated to pay for property which it is proposed to take for municipal purposes, prior to the confirmation of the viewer's report. The Hanover Sewer Company,

one of the exceptants, having taken an appeal from the report, the proceedings are tentative, and cannot be determined until after the appeal will have been disposed of.

The eighth and ninth exceptions are dismissed.

The tenth, eleventh, twelfth, thirteenth, and fourteenth exceptions cannot be sustained. The statute making it lawful for any municipality to acquire sewers, &c., in our estimation enables it to become the owner of such sewer, culverts, conduits and pipes with necessary inlets and appliances, for surface, and under surface sewage drainage and the property of such company; Act of April 19th, 1901, P. L. 82.

We think the viewers were right in viewing all the property of the Hanover Sewer Company which was a part of the sewer system used in its system at the Borough of Hanover of which that municipality is seeking to acquire ownership.

The tenth, eleventh, twelfth, thirteenth and fourteenth exceptions are dismissed.

The fifteenth exception is without any merit. Exhibits "E" and "F" attached to and made part of the viewers' report, show the appearance of the attorneys representing all parties interested in the proceeding who all participated in the inquiry, and the viewers have returned on page 8 of the report that "The names of the counsel who appeared are more fully set out in Exhibit "F," which is attached hereto and made part of this report. That no exceptions or objections to our schedule were filed by either party, neither was any further evidence offered by either party. We, therefore, do not deem it necessary to change our schedule of damage sustained by the said Hanover Sewer Company," &c., &c. It seems to us that if the exception contained any merit at all the exceptants should have presented it to the viewers, before they so made their report. The exception is dismissed.

The sixteenth and seventeenth exceptions are dismissed for reasons given in dismissing the first, second and third exceptions.

The eighteenth, nineteenth, twentieth, twenty-first, and twenty-second exceptions, in our estimation, have no merit. We think the petition for the appointment of viewers, the appointment of the viewers, and their report are all in substantial

compliance with the requirement of the laws which authorize and mark out the process for the petitioning municipality to acquire the system of sewers constructed and maintained by the Hanover Sewer Company in the Borough of Hanover.

The exceptions filed by the Hanover Sewer Company on September 3rd, 1913, are identical with those hereinbefore discussed, and for the reasons expressed hereinbefore are all dismissed at the costs of the exceptants.

The Hanover Sewer Company having filed its appeal from the finding of the viewers, no further order can now be entered in this case.

Goeser vs. Voris.

Taxation—Convents—Parochial schools—Act of May 14, 1874, P. L. 158.

A parochial school or a convent building necessary for the operation and management of a school are public charities and are exempt from taxation; the legal test is whether the institution unlawfully discriminates in favor of or against any part of the public.

C. P. Montour Co. In Equity, No. 1, March Term, 1913.

Opinion by Evans, J., October 11, 1913:

This bill seeks to restrain collection of local taxes assessed upon grounds situate in the borough of Danville belonging to the plaintiffs whereon is erected a convent building, for the year 1912, averring exemption from such taxes on the ground that the same is a purely public charity.

From the proofs and admissions we find the following facts:

1. St. Hubert's Catholic Church of the borough of Danville, Pa., owns ground in said borough fronting one hundred and forty-four feet on Bloom street and extending in depth of the same width one hundred and fifty feet to an alley, whereon is erected a Catholic church, a school building and a convent

building. The school building is erected at the end of the church and the convent building is approximately seventy feet east of the church and school building. All practically erected on one lot.

2. The legal title to the property is in the bishop in trust for the Roman Catholics of Danville, Pa.

3. In connection with the church, St. Hubert's congregation established and founded a parochial school a number of years ago. Since that time the said school has been kept going solely by voluntary contribution made generally by members of said congregation and Catholic friends.

4. The said school is free and open to all children who may choose to attend without regard to race, color or religion. No tuition is charged. No charge is made for books or school supplies. The Catholic faith is taught the children whose parents are of that faith. Generally children of the Catholic faith attend the school. Occasionally there are exceptions.

5. The object and purpose of the school is to teach the children of St. Hubert's congregation many of the branches that are taught in the public schools, and in addition thereto the Catholic faith. None but teachers of that faith are employed.

6. The convent building is used solely for a home for the sisters who teach in the school. One of the sisters serves as a housekeeper. The others teach in the school and live in and have their home in the building. Those who teach in the school, in addition to being provided with a home in the convent building, are each paid a salary of \$7.50 per month. The congregation derives no benefit from the convent building other than furnishing a home for the sisters who teach in the school. The sisters' salary and the cost and charges of maintaining the home for them are all paid from voluntary contributions. The convent building is part of the church and school property and is necessary for the efficient operation and management of the school.

7. Originally the ground upon which the convent building is erected was purchased with money received from voluntary contributions and subsequently the building was remodelled for a home for the sisters, who teach in the school by like contributions.

DISCUSSION.

The question in this case is, primarily, Is the school established and maintained by the trustees of St. Hubert's Catholic Church congregation of Danville, Pa., a purely public charity within the meaning of the Constitution and the act of May 14, 1874, P. L. 158, and amendements, excepting seminaries, associations and institutions of learning from taxation? And secondarily and principally, is the convent building occupied by the sisters who teach in said school necessary for the efficient maintenance and enjoyment of said school, and in consequence thereof exempt from taxation because of being a part of said school?

Art. IX, Sec. 1, of the Constitution, provides that: "The general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

The legislature by general law in 1874 exempted church property from taxation. Section I of the act of May 14, 1874, P. L. 158, exempts from taxation public property used for public purposes and places of religious worship and institutions of purely public charity. Section I of the act of May 14, 1874, was amended by the act of June 13, 1911, P. L. 898 to read as follows:

"Section I. Be it enacted, etc., that all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed, necessary for the occupancy and enjoyment of the same; . . . all hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed and maintained by public or private charity; . . . be and the same are hereby exempted from all and every county, city, borough, bounty, road, school and poor tax; Provided, that all land not necessary for the convenient occupancy and enjoyment of the building thereon erected, or hereafter to be erected, shall be liable, and shall

pay all local or municipal taxes of the district wherein located. This shall not be taken to include any county tax: Provided, however, that the words 'enjoyment' and 'occupancy' as used in this act, shall be construed to include only the land necessary for the convenient use of the building or buildings erected or hereafter to be erected thereon, occupied and used for the purposes above described."

1. As to the primary question: Is St. Hubert's parochial school a public charity? Is the school maintained wholly by charity? The pleadings and evidence disclose that the object and purpose of the school is to teach the children of St. Hubert's congregation many of the branches that are taught in the public schools and in addition thereto the Catholic faith. The school is open and free to all pupils who may choose to attend, without regard to race, color or religion. No tuition is charged, no charge is made for books or school supplies. The cost of maintaining the school—the keeping the school going comes wholly from voluntary contributions. The school is not kept going for profit or private gain. At times the voluntary contribution scarcely keeps the school going and it becomes necessary for those who actually keep the school going by their voluntary contributions to increase the same. In speaking for the Supreme Court, in *Episcopal Academy v. Phila.*, Appellant, 150 Pa. 565, at page 572, Mr. Justice Williams says:

"The definition of charity has been steadily broadening; it was once held to be 'whatever is given for the love of God, or for the love of your neighbor, free from any taint or stain of any consideration that is personal or selfish.' But the purity and unselfishness of the motive came to be regarded by the courts as important only in the moral aspects of the act, and was not insisted on in determining whether a gift was to a charitable use. In *Donohugh's Appeal*, 86 Pa. 312, charity was defined as something 'done out of good will, benevolence, a desire to add to the happiness or improvement of our fellow beings.' The fact that selfish considerations induced the act done was thus left out of view, and the act alone considered. In the recent case of *Boyd v. The Fire Ins. Patrol*, 120 Pa.

624, another advance was made, and the court held that a corporation acting in aid and ease of the city of Philadelphia in the preservation of life and property at fires, without gain or profit to itself, was a public charity, notwithstanding the fact that among its acknowledged objects was that of lessening the losses of fire insurance companies. In view of these cases it may be safely said that whatever is gratuitously done or given in relief of the public burden or for the advancement of the public good is a public charity. In every such case, as the public is a beneficiary, the charity is a public charity. As no private or pecuniary return is reserved to the giver or any particular person, but all the benefit resulting from the gift or act goes to the public, it is a 'purely public charity,' the word 'purely' being equivalent to the word 'wholly.' The education of youth and the support of schools are for the advancement of public good, and money given for such purposes was recognized in England as given for a charitable use, before the statute of 43 Elizabeth. Our own courts have uniformly held the same doctrine. The school (Episcopal Academy) may therefore be regarded as a purely public charity if it can meet the requirements of the law as to the manner of its founding, endowment and support. In *Donohugh's Appeal*, 86 Pa. 306, it was held that a purely public charity within the meaning of Art. IX, Sec. I, of the Constitution, which provides that the legislature may exempt from taxation 'institutions of purely public charity,' is not necessarily one solely controlled and administered by the state, but extends to private institutions for purposes of purely public charity, and not administered for private gain. That the essential features of a public use are, that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite and unrestricted quality that gives it its public character."

There is no restriction with respect to pupils who choose to attend St. Hubert's school. It is open to all children who may choose to attend without regard to race, color or religion, and it is maintained and kept going wholly by voluntary contributions. In *Trustees of St. Peter's Roman Catholic Church of McKeesport v. Smith, Collector of Taxes, and the City of*

McKeesport, 189 Pa. 222, Mr. Justice Dean, in speaking for the Supreme Court, at page 232 says: "There is nothing in the act of assembly which requires that the grant of property to a purely public charity shall be stamped with perpetuity. The only requirement is that when the institution seeks exemption, its character, whether created by charter, conveyance, articles of association or voluntary rules and regulations, shall be that of a purely public charity. If it violates its implied duty toward its contributors, equity will afford relief; if it ceases to be that on which it depends for exemption the property at once becomes subject to taxation. Nor in view of the other facts in the case is it important that the trustees are all Catholic and therefore the institution is controlled and managed by Catholics. If there was evidence tending to show exclusion of non-Catholic children, because their belief did not accord with that of the trustees, the fact would have some weight, but standing as it does by itself, it is of but little consequence. There is nothing either express or implied in the law which disqualifies a board of trustees composed of members of a single church from managing and supervising a purely public charity. A Presbyterian, Jewish or other charity may have boards of managers composed exclusively of persons of the faith indicated by the name, but if the benefits are open to all, without regard to creed, it does not affect the public character of the charity. Purely public charities are neither so abundant nor so effective that we can afford to discriminate against them because of the creed and the managing. Our discrimination must rest solely on the fact as to whether they discriminate in favor of or against any part of the public." In the light of these decisions we are of the opinion that the parochial school established and maintained by the trustees of St. Hubert's Catholic Church congregation of Danville, Pa., is a purely public charity, within the meaning of Art. IX, Sec. 1, of the Constitution, and section 1 of the act of May 14, 1874, P. L. 158, as amended by section 1 of the act of June 13, 1911, P. L. 898.

2. Is the convent building occupied by the sisters who teach in the parochial school necessary for the efficient maintenance,

enjoyment and continuance of the school, and in consequence thereof exempt from taxation because of being a necessary part of the school? The evidence discloses that the convent building is but seventy feet distant from the church and school building and is not separated therefrom by a fence or anything else—all being erected on a plot of ground one hundred and forty-four feet by one hundred and fifty feet. That the title to the ground on which the convent building is erected is in the bishop in trust for the Roman Catholics of Danville, Pa. That the building is used exclusively as a home for the sisters who teach in the school; that the furnishing the sisters with a home in the building is part of the consideration they receive for teaching. The building was remodelled approximately ten years ago so as to make it a suitable home for them. The cost of remodelling was paid for out of voluntary contributions. It is also kept up and maintained from like contributions. The building is not rented to them or to any of them. The congregation derives no income or benefit therefrom other than the furnishing of a home for the sisters who teach in the school. It is of no consequence that one of the sisters acts as housekeeper for the sisters who do the teaching. Clearly the convent building is a part of the church and school property and is necessary for the efficient operation and management of the school. *St. Peter's Roman Catholic Church of McKeesport v. Smith, Collector, and the City of McKeesport*, supra, like the case at bar was a bill to enjoin the collection of taxes assessed against a convent building. The facts in that case are stated thus by the Supreme Court, at page 225:

"St. Peter's Roman Catholic Church of McKeesport owns ground fronting two hundred and eighty feet on Market Street and extending back one hundred and forty feet to an alley all enclosed as one property. The legal title is in the bishop of the diocese in trust for the congregation. The church fronts sixty feet on the street, then twenty-two feet distant, the convent fronts on the same street forty feet, then twenty-two feet distant from this is the school building, having a frontage of one hundred feet. The school building was erected in

1887, wholly by the voluntary contributions of the members of the congregation, and has since been maintained by such contributions. It is open to all, free of charge, without regard to creed, color, race or condition; at the commencement of this proceeding there were in attendance about seven hundred and fifty children; no revenue whatever is derived from it. The teachers of the school live in the convent building, which is occupied exclusively by them and no others; they are paid for their services a small salary, in addition to the privilege of residence in the convent building; they are not lessees and have no right or interest in it, except that of residence while teaching; both buildings, when projected, designed and erected, were intended for the use to which they have since been put."

The court held that the convent building was exempt from taxation. The facts in the case are not unlike those in the case in hand. In many respects there is great similarity, and in the opinion of the court that case rules the case in hand. Being of the opinion that St. Hubert's convent building at Danville, Pa., is a purely public charity, we therefore sustain the plaintiff's contention, and find as conclusions of law:

1. That St. Hubert's convent building at Danville, Pa., is not liable to assessment for local taxation.

2. That the injunction should be made perpetual restraining the collection of the taxes.

Defendant's counsel ask the court to find the following conclusions of fact and law, which, with the answers thereto, are as follows:

1. The convent building that is asked to be exempt from taxation in this case is a building in no way connected, physically, with the school nor church, but is a building that was purchased sometime in 1872 or 1874 for a home for the sisters who performed strictly church work and teaching in the private school held in the basement of the church, for which a tuition fee was charged, and is located some seventy feet east of the church building. Answer: I so find.

2. That when this convent building was purchased by St. Hubert's congregation as a home for the sisters and at that

time the only school that was maintained was a private school in the basement of the church, strictly sectarian, for which a tuition fee was charged, and the sisters or some of them were the teachers in this school; that subsequently the church building was enlarged and the school was removed to a portion of the addition added to the church and then the school was by the priest declared to be free, and the salary of the teachers was paid by the congregation and in part made up by contributions regularly collected by the congregation for that purpose. Answer: I decline to so find.

3. That the sisters who teach in the school are employed by St. Hubert's congregation and paid by the same a regular salary, and are not dependent upon the voluntary contributions collected. But said voluntary contributions are for the purpose of reimbursing the congregation for the amount expended as the salary of the teachers. Answer: I so find.

4. That the convent building in question is occupied by sisters other than those teaching in the school and was originally intended and is used for a home for the sisters. Answer: I so find. One of the sisters acts as housekeeper. The fact, however, is of no consequence. The home must be cared for.

5. That the school maintained in the church building is not a purely public charity. Answer. I decline to so find.

6. That the convent building when purchased and altered and remodelled was not purchased, altered and remodelled with the intention of using it in connection with a free school or for any school and that the use that is claimed for it now was not the purpose when it was purchased by the contributions raised for that purpose. Answer: I decline to so find.

7. That the convent building is no part of the school building and is not necessary for the operation and management of the said school as now conducted. Answer: I decline to so find.

8. That the school conducted there is a strictly sectarian school conducted under the faith and discipline of the Roman Catholic Church and that it is a prerequisite to the employment of the teachers therein that they be of the Catholic faith. Answer. I decline to so find.

CONCLUSIONS OF LAW.

1. That the school conducted in this case is not a purely public charity. Answer: I decline to so find.

2. That the convent building should not be exempt from taxation. Answer: I decline to so find.

3. That the convent of St. Hubert's Catholic school is not such a purely public charity, founded, endowed and maintained by public or private charity as is entitled to be exempt from taxation under Art. IX. Sec. I, of the Constitution of Pennsylvania and the laws passed thereunder. Answer: I decline to so find.

4. That the injunction should be dissolved. Answer: I decline to so find.

In accordance with the views hereinbefore expressed the prothonotary is directed to enter and give notice of the following decree nisi:

Now, Oct. 11, 1913, this cause came on to be heard and was argued by counsel, and upon consideration thereof by the court it is ordered, adjudged and decreed as follows: That the defendants be perpetually restrained from collecting the taxes mentioned in plaintiff's bill.

In re: Election of Councilmen, Borough of Wilkinsburg.**Election Law—Ballots—Candidates of two parties.**

In case a candidate is nominated by two parties a voter making a cross behind each square invalidates his ballot.

Q. S. Allegheny Co., No. 14, November Sessions, 1913.

Patterson, Crawford, Miller & Arensberg, for petitioner.

Lyon & Hunter, for respondent.

Opinion by Ford, J., January 3, 1914:

This motion is to quash the petition to contest the election of one of the two councilmen who on the final count of the

ballots appears to have been elected as councilman of the Second ward of the borough of Wilkinsburg.

At the election held November 4, 1913, Jacob Weisman was a candidate for the office of councilman of the Second ward of the borough of Wilkinsburg. He was the candidate of the Washington party and had also been nominated by nomination papers under the title of Good Government party.

In these proceedings the election of one of the councilmen is contested by the required number of qualified electors, who in their petition allege that when the election officers of the Second precinct of the Second ward came to count the ballots, they found a number of ballots marked as follows: After the name of Jacob Weisman there appeared two crosses, one in the square after the name "Washington Party" and one in the square after the name "Good Government Party" and no other cross appeared after the name of any other of the candidates for councilman. The election board rejected the ballots so marked and refused to count them as legally cast for Jacob Weisman. The petition further alleges that by reason thereof the said Jacob Weisman received a smaller number of votes on the reutrn made than the number actually cast in his favor and if said votes had been properly counted in his favor he would have been elected. The petition does not set forth the names of the various candidates, the number of votes cast for the different candidates, nor the number cast and counted for Jacob Weisman.

The sufficiency of the petition is not questioned. By stipulation filed the parties agree "that the question before the court for its decision at this time is whether the ballots marked with a cross in the space which followed the name of Jacob Weisman designated 'Washington Party,' and with another cross in the space which followed his name designated 'Good Government Party,' were legal votes for the said Jacob Weisman, and were improperly rejected by the election board."

That the ballots were not marked in the manner provided by law is conceded, but the petitioner, Jacob Weisman, contends that it was the manifest purpose of the voter to vote for him for the office of councilman and the difficulty of determining

whether to credit either or both or neither of the political parties with a vote should not affect the question of whether or not he should be credited with a vote in accordance with the true intent of the voter as evidenced by the ballot.

The election laws recognize the right of a voter to vote not only for the candidate, but to indicate the party with which he is affiliated and the political party has the right to have the vote for it counted and returned.

Section 5 of the Act of 1903, P. L. 338, provides that the judges in the presence of the inspector shall read aloud the name or names marked or inserted upon each ballot together with the party name or political appellation under which each vote was cast. Again it provides a full return shall be made in the manner now provided by law of all votes cast and such returns, as well as those made by the judges of the court, shall state in every case the number of votes cast for each candidate by each political party or body of which such candidate is the nominee as the same shall appear upon the ballots cast.

In re Contested Election of Sheive (Q. S. Montgomery Co., 1912) 9 Schuylkill, p. 1. it was said: "What then was the effect of placing a cross-mark opposite the name of the candidate twice for the same office? Clearly to show that the voter intended to vote them as candidates of two parties for the same office. How then were the election officers to count the votes? Certainly not two votes for the candidates, for the elector could give only one. But to which political party should the vote, if they gave him but one, be credited? Not to both and not arbitrarily to either one. Here, then, was a case where the election officers could not gather the intention of the voter, with reference to the political party for which he intended to vote. The voter had marked his ballot otherwise than as directed by the Act of Assembly, so that it was impossible to determine the voter's choice of the political party for which he has voted. The rights of political parties to have votes credited to them is important and cannot, with impunity, be disregarded by the voter or election officers." To the same effect is Lurch's Election, 21 Dist. R., 692.

In East Donegal Township Contested Election, 21 Dist. R.,

1091, three ballots were marked in both the Democratic and Keystone squares for the name of F. S. Weiman, a candidate for supervisor. The action of the election officers in rejecting the votes was sustained.

We are of opinion that the votes were properly rejected by the election officers and, the action of the election officers being the only reason assigned for contesting the election of one of the councilmen of the Second ward of the borough of Wilkesburg, we sustain the motion to quash and dismiss the petition of contestants, directing them to pay the costs.

Phoenixville Borough vs. Little. (Abridged).

Borough Ordinances—Summary Convictions for violating—Appeal lies only to Quarter Sessions—Act of June 4, 1897.

The opinion of Butler, J., December 12, 1913, Chester County, quotes section 2 of the above act as follows:

"All actions, prosecutions, complaints and proceedings for the violation of borough ordinances, and for the collection of fines and penalties imposed thereby, may be commenced by warrant or by summons, at the discretion of the chief burgess or justice of the peace before whom the complaint is made . . . Warrants shall be returnable forthwith, and upon such return, the like proceedings shall be had in all cases as are or may be directed by law in relation to summary convictions, with the same right of appeal from any final judgment entered therein . . . upon judgment against any person by summary conviction."

He holds that pressing for a summary conviction under an ordinance makes the proceeding throughout the same as summary proceedings and convictions generally, and that the appeal should be to the quarter sessions; that prior to the act boroughs brought suits for penalties, but now they may either so proceed or may prosecute a summary conviction. Under the circumstances the court granted time to the defendant's counsel to show authority, if possible, for transferring the case from the common pleas to the quarter sessions.

Borough of Bellevue et al. vs. Ohio Valley Water Co.

Affirmed, 245 Pa. 114.

**Boroughs—Water Rates—Reasonableness—Public Service
Commission—Act of July 26, 1913.**

The Public Service Commission provides a full, complete and adequate system of determining questions affecting public service companies and the public, so that the court has been deprived of jurisdiction in determining the reasonableness of rates, and as the commission may direct the refunding of money no injunction will be granted.

C. P. Allegheny County, in Equity No. 438 April Term, 1914.
David L. Starr and Leonard K. Guller, for plaintiff.
Gordon & Smith, for defendant.

Opinion by Evans, J., February 11, 1914:

The Borough of Bellevue and two of its citizens and taxpayers filed this bill against the Ohio Valley Water Company. The Boroughs of Avalon, Ben Avon and Emsworth, with certain citizens of each borough, filed separate bills against the Water Company, and as all of these bills and the prayers for relief are substantially the same, they may all be disposed of in one opinion.

The allegations of the bill are, in substance, that the Ohio Valley Water Company is a corporation of the State of Pennsylvania, organized for the purpose of supplying water to the public in the said borough and elsewhere; that it is the successor of the Bellevue Water Company, a corporation organized for the same purpose; that the Bellevue Water Company in 1896 and 1897 entered into contracts with the Borough of Bellevue by the terms of which the borough granted to the water company the right to lay its pipes in the streets of the borough, and in turn the water company agreed to furnish water to the borough and to the citizens of the borough at rates provided in the said contract; that "The rates herein specified shall not be increased by the Bellevue Water Company, its successors or assigns, without the permission of the borough council"; that the term of the contract was

co-extensive with the franchise; that on the 30th of December, 1913, the Ohio Valley Water Company posted its water rates, to become effective on December 31, 1913, and that these rates are greatly in excess of the rates specified in the contract between the borough and the water company and that the water company is demanding from its customers, in payment for the water furnished by it, payment under the new rates established on December 31st, and that the water company has threatened to discontinue the furnishing of water in case of non-payment of the rates.

The plaintiff prays:

First. "That the said defendant company be restrained by injunction by your honorable Court, at first temporary and afterward to be made permanent, from discontinuing the service of water to the public buildings, fire hydrants, sewer system and other public places in the Borough of Bellevue, and from the residences and places of business of your orators."

Second. "That by like injunction the defendant company be restrained from discontinuing the usual service of water and making the same dependent upon the payment to the defendant of other than the rates set forth in the ordinances hereto attached and marked Exhibits 'A', 'B', 'C' and 'D'."

Third. "That by like injunction the defendant company be restrained from putting into force the increased rates set forth herein, or any other rate of increase in conflict with the terms of the ordinances hereto attached and marked Exhibits 'A', 'B', 'C' and 'D' until the same shall be agreed to by the Bellevue Council according to the terms of said ordinances."

Fourth. "That a like injunction be made for the protection of each and every other citizen of the Borough of Bellevue, who may be a consumer of water supplied by the defendant company, upon securing pro rata his, her or their liability on the injunction bond and to share the costs and the expenses of this proceeding."

And for general relief.

An examination of the plaintiff's bill discloses the fact that the prayer for an injunction is based solely upon the ground that the plaintiff, the Borough of Bellevue, has a contract with the water company, fixing the rate at which water will be sup-

plied to the municipality and to the citizens thereof, and that that contract is irrevokable and that the rates for water cannot be increased except by the consent of Council in accordance with the terms of that contract. There is no allegation in the bill that the new water rates established on December 31, 1913, are excessive, and the reason why such an allegation is not contained in the plaintiff's bill is apparent, for it is conceded by the plaintiff's that the court of Common Pleas has not jurisdiction to determine the reasonableness of water rates since the passage of the act of July 26, 1913, P. L. 1374. The only authority possessed by the Court of Common Pleas to determine the question of reasonableness or unreasonableness of water rates was contained in the seventh clause of Section 34 of the Act of the 29th of April, 1874, P. L. 73, and that part of the clause has been expressly repealed by the Act of 1913, above referred to.

The question then presented to this court by the bill of the plaintiffs is whether we will enjoin the defendant company from increasing its rates without any power on the part of this court to examine into the reasonableness of that increase, and solely because on its entrance into the borough the water company fixed by contract with the borough the rates to be charged for the furnishing of water.

This question was raised in the case of the borough of Turtle Creek and other boroughs against the Pennsylvania Water Company, not yet reported, and similar contracts between the water company and the several boroughs were held to be subject to the revision of rates by the Court of Common Pleas. It is true that in the case of the Borough of Turtle Creek, in which the opinion was written, it is suggested in the opinion of the court that so far as meter rates were concerned the terms of the contract were that meter rates should be the same as established in the City of Pittsburgh, and that at the time the contract was executed the City of Pittsburgh had no meter rates for domestic purposes. But the same decision was made in the cases of the Borough of East Pittsburgh, where the terms of the contract fixed the rates to be charged to the consumers as the same at that time charged by the Pennsylvania Water Company to the consumers of other boroughs, so that the clear decision of the

court in those cases was to the effect that although the rates were definitely fixed by the contract, the term of the contract being unlimited and indefinite, the rates were subject to revision by a court of competent jurisdiction. This was before the passage of the Public Service Act of July 26, 1913, and without passing upon the question, there is a strong intimation in the opinion of the Supreme Court that since the passage of that act no contract fixing the rate for service by a public service company is irrevokable. Section 8 of Article 3 of said act provides:

"It shall be unlawful in any public service company (a) To charge, demand, collect or receive, directly or indirectly, by any special rate, rebate, drawback, abatement or other device whatsoever, from any person or corporation, for any service rendered or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect or receive from any other person or corporation for a like contemporaneous service under substantially similar circumstances and conditions. (b) To make or give any undue or unreasonable preference or advantage in favor of or to any person or corporation, or any locality, or any particular kind or description of traffic or service in any respect whatsoever; or to subject any particular person or corporation or locality or any particular kind or description of traffic or service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 1 of Article 5 of the said Public Service Act, providing for the powers of the Commission, states:

"Said power and authority shall include the power to inquire into and regulate the service, rates, fares, tolls or charges of any and all public service companies."

Section 3 provides: "Whenever the Commission shall determine, after hearing had upon its own motion or upon complaint that the rates, fares, tolls or charges established, demanded, exacted, charged or collected by any public service company or companies, for any service rendered or furnished, are unjust or unreasonable or inadequate or are unjustly discriminatory or unduly or unreasonably preferential . . . then the Commission shall determine and prescribe by specific order the maximum just, due, equal and reasonable rates, fares, tolls and

charges to be thereafter established, demanded, exacted, charged or collected for the service to be performed."

It will be observed by the provisions of the act quoted above that it was the purpose of its framers not only that rates should be reasonable, but that they should be uniform for the same service performed and that the tribunal to determine that question should be the Commission created by that act.

An examination of the bills filed by the several boroughs now before me, discloses the fact that the meter rate for domestic purposes, as fixed by the contract between the water company and the Borough of Bellevue, is twenty cents per thousand gallons and the meter rate fixed by the contract with the Borough of Avalon is thirty cents per thousand gallons. On the face of these contracts it would appear that they violated the terms of the Act of July 26, 1913, which provides that the rates shall be uniform for the same service rendered, and this court is asked to enforce these two contracts by permanent injunction against the water company without any power in the court to examine into the question of rates, as to whether the rates fixed by the contracts contravened the Act of Assembly or not.

Section 31 of Article 6 of the Public Service Company law provides: "That no injunction shall issue modifying, suspending, staying or annulling any order of the Commission or of a Commissioner except upon notice to the Commission and after cause shown upon hearing. The Court of Common Pleas of Dauphin County is hereby clothed with the exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions subject to an appeal to the Supreme Court.

While this bill does not ask the court to modify, suspend or stay any order of the Public Service Commission, yet it would have this court anticipate the action of the Commission and by issuing an injunction determine finally that the contracts between the borough and the water company are irrevokable and that the rates fixed there may not be raised except in accordance with the term of the contract. It will be readily seen that if our injunction is to have any binding effect with the Commission it would prevent that body passing upon the question

of the unreasonableness of the rates fixed by the contract. If it does not bind the Commission, what a vain thing this court is asked to do.

I have discussed this application for an injunction on the allegations of the bill and the prayer. On the argument of the motion it was suggested by the counsel for the plaintiff that this court should issue an injunction restraining the enforcement of the new schedule of rates until the Public Service Commission should pass upon their reasonableness. As I stated before, there is nothing in the bill which alleges these rates to be unreasonable. There is nothing which recognizes the jurisdiction of the Public Service Commission and there is nothing in the prayer of the bill requesting this court to intervene and stay proceedings until the Public Service Commission can pass upon the question.

Section 5 of Article 5 of the Public Service Company law provides: "If after hearing on complaint or upon motion the commission shall determine that any rates which have been collected or any acts which have been done or omitted to be done, or any regulations, classifications or practices which have been enforced or in relation to any service rendered, after this act becomes effective, by any public service company complained of were in violation of any order of the Commission or were unjust or unreasonable or unjustly discriminatory or unduly or unreasonably preferential . . . the Commission shall, upon petition, have the power and authority to have an order for reparation awarding and directing the payment to any such complainant petitioner, within a reasonable time specified in the order, of the amount of damages sustained in consequence of said unjust, unreasonable or unlawful collections, acts or commissions, regulations, classifications or practices of such public service companies."

It would seem to me that the above section gives to the Public Service Commission full power to direct the refunding by the Ohio Valley Water Company of any moneys collected under the new schedule which by the final order of the Commission shall be determined to be excessive. But the company, in the argument of this case at bar and in its brief submitted, proposed

that in order to guard against any possible interpretation of the above section which would determine that the Commission had no authority in this particular case to direct reparation, that the defendant company will file in this case a stipulation to refund all moneys collected under the schedule established December 31st, which after hearing before the Commission shall be deemed to be in excess of just and reasonable rates, and for the purpose of enforcing that stipulation will recognize the jurisdiction of this court.

Unless we are going to sustain the prayer of the bill in full and permanently enjoin the collection or enforcement of the rates other than those fixed by the contract between the water company and the borough and declare that the Public Service Commission has no power to change those rates, then in view of Section 5 of Article 5 of the Public Service Law, supplemented by the proposed stipulation of this defendant company, I can see no substantial grievance which these plaintiffs have upon which to base an injunction.

The court, in the cases of the several boroughs against the Pennsylvania Water Company, above referred to, did not enjoin the collection of the new rates, but in its decree directed the refunding to the several customers of the water company of the amount collected in excess of the rates fixed by it.

If we had full jurisdiction in this case, as our court had in the Pennsylvania Water Company cases, we would, in all probability, follow the practice established by those cases.

It is urged by plaintiff's counsel that the case of the Borough of Bellevue against the Manufacturers Light & Heat Company, 238 Pa., 388, governs this case and that the Supreme Court decided in that case in effect that this water company cannot maintain its water pipes in the streets of the Borough of Bellevue and not perform the obligations of its contract entered into with the borough by virtue of which it obtained the right to so occupy the streets. I do not think the Manufacturers Light & Heat Company case governs the present one. In the first place, water companies have the right to occupy the streets of a municipality without the consent of the municipal authorities, and gas companies have not; but I do not think that that is the

controlling difference between the two cases. An examination of the case of the borough against the Manufacturers Light & Heat Company discloses the fact that the gas company based its entire case upon the allegation that the contract between it and the borough was void from the beginning. That was the only question before the court. There was no question of reasonable or unreasonable rates in that case and all the court decided in that case was that that contract was a valid contract and that the gas company could not avoid its obligations under that contract by simply ignoring it. We may take whatever view of this case we choose, look at it in any way we please, it comes back to the question of the fixing of rates for water. The power to determine the reasonableness of these rates is in the Public Service Commission. To them this case must finally go, no matter what we do, and for this court to issue an injunction with no power to inquire into the real merits of the case is not a wise thing to do.

But there is a well-known principle of equity jurisdiction which effectually disposes of the question of whether this court has any jurisdiction to dispose of the questions involved in this bill. Equity has no jurisdiction of a controversy where there is an adequate remedy at law. This is such a fixed principle of equity jurisdiction that the plaintiff in his bill must allege that he has no adequate remedy at law. The specific performance of the contract, or what is to the same effect, the enjoining the breach of a contract, except contracts affecting title to real estate, is the exception and not the rule. Ordinarily, in cases of personal contracts, the courts relegate the plaintiff to his action at law. The real matter in controversy between the parties to this bill is the question of reasonable rates to be paid by the consumers for the water furnished to them. The Legislature of Pennsylvania, by the Act of July 26, 1913, established a full, complete and adequate system for the determination of all questions affecting the relations between public service companies and their patrons and for the carrying out of the provisions of that act it established a tribunal for the determination of all questions arising under the act. This, in my judgment, ousts the jurisdiction of the court of equity to

determine the questions raised by this bill. There is a complete and adequate remedy established by the legislature to determine the rights of the plaintiffs and the defendants in this controversy. That being true, equity has no jurisdiction. I might have determined this question solely on this last proposition, but I have discussed some of the provisions of the Public Service Act, not for the purpose of giving any decisive judgment as to the interpretation of that act, because that is for the Commission to determine, but for the purpose of illustrating how complete the legislature has covered every matter of controversy between public service companies and their patrons, and what extensive powers, are possessed by the tribunal created by the legislature to pass upon questions of dispute in such cases.

As I stated before, in my judgment Section 5 of Article 5 of the Public Service Act gives to the Commission the power in this case to order reparation; but as this is a new act and other courts which may have to pass upon this question may differ from me, in order that the rights of these plaintiffs may be fully protected in the premises, we will accept the proffer of the defendant company to file a stipulation and retain the bill for the purpose of enforcing it.

And now, motion for preliminary injunction refused.

Treichler et al. vs. Borough of Kutztown.

Boroughs—Extensions—Lots and Outlots—Act of April 23, 1903, P. L. 247.

Land used for farming purposes is not necessarily excluded from being annexed to a borough under an ordinance annexing certain lots and outlots.

C. P. Berks Co., No. 1082, Equity Docket, 1912.

C. H. Ruhl, for plaintiff.

W. J. Rourke, for defendant.

Opinion by Wagner, J., June 21, 1913:

The exceptions filed in this case relate almost entirely to the fifth Finding of Fact and the Conclusions of Law based thereon. Exceptants take the view that because the premises of Anna Eliza Treichler had, prior to the time of annexation, been used exclusively for farming purposes, that therefore they necessarily cannot be included in the terms of lots and outlots as used in the Act of April 23, 1903, P. L. 247. We consider that this is giving too confined and narrow a view to these terms as there used. The testimony and the draft or map of the section admitted as part of the Kutztown Borough clearly show the farm buildings of this plaintiff, Anna Eliza Treichler, surrounded by building lots with houses thereon erected, and that the section south of the railroad particularly complained of as not being an outlot, has a large part situated along the railroad already sold off for manufacturing and industrial purposes. From the character of the place that has thus sprung up upon a portion of the farm, together with the course of conduct pursued by Anna Eliza Treichler since 1901 in the sale of either separate building lots or larger tracts which, by the grantees, have been sub-divided into smaller building lots, it is manifest that the farm is in the market for sale as lots, and that the use made of the unsold portion for farming purposes is but a temporary use.

In the former proceedings for annexation this portion now annexed was a part. This court there found that one of the tracts annexed had been used exclusively for farming purposes and was not in the market for sale as building lots. The Superior Court, in considering that case, upon appeal, in *Fister vs. Kutztown Borough*, 49 Pa. Sup. Ct. 483, on page 488, say: "It is only upon the ground that the lands excluded by the court were not 'lots or outlots,' within the meaning of the act of 1903, that its decree as a whole can be sustained. We are not prepared to decide that they were not lots or outlots, within the meaning of that act." Also, on page 489, "We are not convinced that the fact that they are exclusively farm lands is sufficient to invalidate the ordinance as to them." In this

case the Superior Court clearly intimates that the restricted meaning of the terms "lots and outlots" as taken by these plaintiffs, cannot be maintained.

And now, the exceptions are dismissed and counsel may prepare and submit the proper final decree sec. reg.

Ramage vs. Lower Burrell Township.

Townships—Negligence—Guard rails.

The absence of a guard rail is the proximate cause of injury where a horse backs over a declivity along a very narrow public road, if there is no negligence on the part of the driver and nothing wrong with the harness, where it appears that the accident was not plainly due to some unrelated cause.

C. P. Westmoreland County, No. 715 May Term, 1911.

Williams, Wegley & Doran, for plaintiff.

H. H. Dinsmore, for defendant.

Opinion by Doty, P. J., May 6, 1912:

The principle which controls this case is that it is the duty of a municipality having control of highways to keep them reasonably safe for ordinary travel by the ordinary horse. It is under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist or such as may be reasonably expected to occur. 2 Dillon on Municipal Corp., Sec. 1015. The principle itself is readily understood and it should not be a hard matter to apply it to any case which may arise.

The real difficulty, however, is in making application of the principle to the circumstances of each case. The cases on this subject are without number and are not so helpful as they might be because of apparent conflict in the decisions and because each case must be determined on its own peculiar facts and circumstances.

The accident occurred on a public road; at the place where the accident happened the road was smooth and had a width

of 13 feet; the plaintiff was aged 61 years and was in a one horse buggy as the guest of her son who was driving a pony slowly along the road; at the side of the road at the point of accident there was a declivity of 33 feet; the buggy and harness were sound and in good condition; the pony was gentle; had no bad habits and its owner testified that he never knew him to back; at this point in the road the pony stopped and commenced to back and the buggy was backed over the declivity resulting in the injuries complained of; the plaintiff testifies that she saw nothing nor heard any noise, and the driver gives evidence that "the horse started to back; don't know what scared him."

At this point in the road there was no barrier or guard rail. The verdict establishes that a guard rail was necessary. And such conclusion is justified by the evidence, as all the cases, no matter how otherwise they may differ, are uniform in holding that a "highway must be guarded by suitable barriers where it passes a declivity or precipitous descent." But was the absence of a guard rail the proximate cause of the injury? The case turns on the decision of this question. There is no complaint of any other feature. The question was fairly submitted to the jury under proper instructions. The contention is that there was no evidence which justified the submission of the question. The defendant, therefore, asked for binding instructions at the trial and now moves for judgment non obstante veredicto.

It seems plain that under the circumstances of the case the court would not have been justified in taking it from the jury. The road was very narrow; the place was dangerous and should have been protected by a guard rail; there was no negligence on the part of the driver and nothing wrong with harness or buggy. That the horse frightened is a plain inference from the testimony. He did not balk and refuse to move. He suddenly stopped and backed a few steps only taking the buggy over the declivity. The instinct of a horse is to get away from the object that terrorizes him. Sometimes he runs away; sometimes he moves backward. The case is plainly one for a jury and not one for the court to determine.

That the plaintiff did not know what scared the horse is not fatal to her case. In *Scott Township vs. Montgomery*, 95 Pa., 444, the horse shied from an unknown cause and sprang down a bank. And in *Yoder vs. Amwell Township*, 172 Pa., 447, it is not known what scared the horse. The latter case is analogous and clearly sustains the verdict here. In the opinion of the court numerous authorities are cited and they all agree in holding the absence of a guard under such circumstances to be the proximate cause of the injury. Under somewhat similar circumstances the same doctrine is laid down in *Russell vs. Westmoreland County*, 26 Sup. 425. In *Bitting vs. Maxatawry*, 177 Pa. 213, under a state of facts very similar we find the court saying. "The mere facts that a horse has passed safely over and a very few feet beyond a dangerous and negligently guarded bridge, then, without fault of the driver backs on and off it, do not of themselves warrant the court in declaring as a matter of law, the negligence of defendant was the remote cause of the injury."

And while the cases are innumerable and in apparent conflict, we think no case can be found which does warrant the court in holding that the negligence of defendant was the remote cause of an injury occasioned by the sudden backing of a horse where the road is very narrow with a deep declivity at the side without a barrier, where the accident occurs, in immediate proximity to the dangerous place unless there was negligence in the driver or the accident was plainly due to some unrelated cause.

With this understanding of the law following and in the line of the case already cited, we are of opinion that plaintiff is entitled to judgment on the verdict. As this was the only matter urged at the argument the reasons assigned for a new trial need no special consideration. The case seems to have been fairly tried, the verdict is not excessive and we do not see how we could do otherwise on a re-trial.

And now, after due consideration new trial refused, and upon payment of jury fee judgment on the verdict.

Commonwealth vs. Rapp.**Baseball—Sunday Law—Act of April 22, 1794.**

The Act of April 22, 1794, is constitutional and playing baseball on Sunday at a public park is a violation of the act.

C. P. Bucks Co., No. 37, Sept. T., 1912.

Geo. B. Carr, for commonwealth.

Howard I. James, for defendant.

Opinion by Ryan, P. J., July 8, 1913:

The transcript of the justice shows that upon information and complaint the exceptant, with others named, was charged "with Sabbath breaking by the use and practice of the unlawful sport or diversion of playing baseball on Sunday, June 30, 1912, on the baseball grounds in Bristol Township, near Bristol Borough, in the County of Bucks, State of Pennsylvania, between the hours of 3.30 and 4.30 o'clock P. M., in violation of and contrary to the provisions of an act of assembly of the State of Pennsylvania, entitled 'An act for the suppression of vice and immorality and unlawful gaming, and to restrain disorderly sports and dissipation,' passed April 22, 1794." The record further shows the trial and conviction of the defendant upon the charges preferred, and the imposition of a fine of \$4 and the costs of the proceeding, or in default of the payment thereof, etc., a sentence to imprisonment for six days in the county prison. It also appears by the transcript that when the justice "proceeded to make out a commitment of the defendant," after the defendant had refused to pay and had tendered a recognizance in an appeal, the latter paid the fine and costs "under protest." While the question is not raised here, we are of the opinion that the payment was made under such circumstances as constituted duress, and was, therefore, not a voluntary one. The exceptant is, consequently, not precluded from this remedy by such payment.

The question of the justice's jurisdiction is raised by the ninth, tenth, eleventh, twelfth, thirteenth and seventeenth

exceptions, which, in substance, aver that to play baseball upon Sunday is not, per se, a violation of law, (1) because the Act of April 22, 1794, 3 Sm. Laws, 177, is unconstitutional, and (2) because it is not within the prohibitions of that act to play said game on that day of the week. The first objection is without foundation. Counsel for the exceptant contends that the title of the Act of 1794 does not comply with the provisions of section 3 of art. III of the Constitution of 1874, which is as follows: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." It is evident from the language employed that this limitation was intended to be imposed upon the general assembly in the enactment of future legislation. It is not retroactive in effect. The Constitution of 1790 contained no such provision, and it was not until 1864 that the Constitution of 1838 was substantially so amended. Whether the title to the Act of 1794 is open to the criticism which counsel makes is therefore unimportant.

The other objection raised, that the act committed by the exceptant is not a violation of the Act of 1794, will be considered next.

The title of the statute is as follows: "An act for the prevention of vice and immorality and of unlawful gaming, and to restrain disorderly sports and dissipation." Its preamble and 1st section are as follows: "Whereas, the act of assembly, entitled 'an Act for the prevention of vice and immorality and of unlawful gaming, and to restrain disorderly sports and dissipation,' passed Sept. 25, 1786, will soon expire by its limitation, and it is proper and requisite to continue or supply the same, with certain additional alterations and amendments, the better to secure the execution thereof; therefore,

"Section 1. That from and after the 1st day of August next, if any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practice any unlawful game, hunting, shooting, sport or diversion whatsoever on the same day, and be convicted thereof, every such person so offending shall for every such offence

forfeit and pay \$4, to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum, or goods and chattels cannot be found, whereof to levy the same by distress, he or she shall suffer six days' imprisonment in the house of correction of the proper county: Provided always, that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns, and other houses of entertainment, for the use of sojourners, travelers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travelers, or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessities of life before nine of the clock in the forenoon nor after five of the clock in the afternoon of the same day."

The act contains thirteen sections. The 4th section regulates the form of procedure under its provisions. Only the 1st and 4th need be considered here. The question of the justice's jurisdiction here raised involves the construction of the words "or shall use or practice any unlawful game, hunting, shooting, sport or diversion whatsoever on the same day."

Do they constitute a prohibition of the playing of the game of baseball on Sunday? It is contended by the learned counsel for the exceptant that the word "unlawful" qualifies the words "hunting, shooting, sport or diversion" as well as "game," and that only such game, hunting, shooting, sport or diversion as is unlawful at any time is within the meaning of the statute. Such a construction would render the statute superfluous. Why prohibit by this act the practice upon Sunday of those things already prohibited altogether by some other statute? The word "unlawful" may not be well chosen and applied in this connection, but we cannot accept the construction contended for, as it would narrow the operation of the law within what the legislature evidently intended. It is the apparent purpose of this act to preserve the sanctity of the Sabbath. It embodies the idea of Sabbath observance that prevailed at the time of its enactment. The interpretation of the spirit and purpose of the Act of 1794 is declared in *Johnston v. Com.*, 22 Pa. 102, by Woodward, J., in the following explicit language: "Our

fathers, who planted in our fundamental law the assertion of those immortal truths, that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, that no man can be compelled to attend, erect or support any place of public worship, and that no human authority can in any case whatever control or interfere with the rights of conscience; enacted also the statutes of 1705, 1786 and 1794 for the suppression of worldly employments on Sunday. So far from conflicting with those invaluable rights of conscience, they regarded such statutes as indispensable to secure them. It would be a small boon to the people of Pennsylvania to declare their indefeasible right to worship God according to the dictates of their consciences, amid the din and confusion of secular employments and with desecrations on every hand of what they conscientiously believe to be hallowed time. These statutes were not designed to compel men to go to church or to worship God in any manner inconsistent with personal preferences, but to compel a cessation of those employments which are calculated to interfere with the rights of those who choose to assemble for public worship. The day was set apart for a purpose, and the penal enactments guard it, but they leave every man free to use it for that purpose or not. If he wish to use it for the purpose designed, the law protects him from the annoyance of others; if he do not, it restrains him from annoying those who do so use it.

"Thus the law, without oppressing anybody, becomes auxiliary to the rights of conscience. And there are other rights intimately associated with the rights of conscience which are worth preserving. The right to rear a family with a becoming regard to the institutions of Christianity, and without compelling them to witness hourly infractions of one of its fundamental laws—the right to enjoy the peace and good order of society and the increased securities of life and property which result from a decent observance of Sunday—the right of the poor to rest from labor, without diminution of wages or loss of employment—the right of beasts of burden to repose one-seventh of their time from their unrequited toil—these are real and substantial interests which the legislature sought to secure

by this enactment; and when has legislation aimed at higher objects? If we doubted the policy of the statute, it would, nevertheless, be our sworn duty to administer it faithfully; but with a profound conviction of its wisdom and value, we are resolutely opposed to a course of judicial construction that would cheapen its demand and impair its power for good."

This view of the law is confirmed and emphasized by Chief Justice Lowrie in *Com. v. Nesbit*, 24 Pa. 398, where, speaking for the Supreme Court, he says: "Let us inquire why people are forbidden to carry on their worldly business on the Sabbath? Our brother Woodward has already shown that it is in order that people may devote the day to rest and to the worship of God, 9 Harris, 432; 10 Harris, 102. Our first law on this subject was the 36th of the laws agreed upon in England, May 5, 1682, which declares the purpose to be for the ease of creation, and that people may the better dispose themselves to worship God according to their understandings.' The very first law of the first General Assembly of Pennsylvania was on this subject, and was passed at Chester, Dec. 7, 1682. It declares that 'for the ease of creation, people shall abstain from their usual and common toil and labor, that they may the better dispose themselves to read the scriptures of truth at home and frequent meetings of religious worship.' This law was re-enacted in 1700, and again in 1705, in nearly the same words. These re-enactments were, doubtless, rendered necessary by repeals in councils. The English statute which served, in some measure, as a model for all these was passed in 1676 (29 Car. II, ch. 7), and goes much further, for it requires people to observe the day 'by exercising themselves in the duties of piety and true religion, publicly and privately'. . . We are not forgetting that the public acts of our Pennsylvania ancestors abound with declarations in favor of liberty of conscience, and that some regard these declarations as inconsistent with the Sunday laws. But a little reflection shows that they indicate the moral ideal to which all government ought to approach as nearly as possible, rather than a positive principle of legislation. And in applying such declarations, we must bear in mind that they proceeded from an earnestly Christian people, and must receive a partial interpretation."

While the cases in which the Supreme Court thus interpreted the Act of 1794 involved, in each instance, the question whether certain business was "worldly employment" within the meaning of the statute, its declaration of the intent and purpose of the legislature in enacting the law must be accepted here and must control the decision of the question before the court: Is the playing of baseball, at a public park or place, even if free from circumstances that would make it a public nuisance, consistent with that observance of the Sabbath which the legislature contemplated when it enacted this law? Not only was all worldly employment, with certain exceptions, forbidden on Sunday, but, for the same reasons, the "use and practice of any unlawful game, hunting, shooting, sport or diversion whatsoever" was also prohibited. This was because Sunday was recognized not only as a day of rest, but as a day of worship and religious observance as well. If it was the purpose of the act, as Woodward, J., in *Johnston v. The Com.*, 22 Pa. 102, declares "to compel a cessation of those employments which are calculated to interfere with the rights of those who choose to assemble for public worship," it was as certainly the legislative intent to prohibit those games, sports and diversions which have the same effect. Nor does it appear that the legislature intended to except some diversion from its prohibition. The use or practice of any unlawful game, hunting, shooting, sport or diversion whatsoever is forbidden. This language is not ambiguous. The reasoning of Woodward, J., above quoted, is as applicable to a public game played by a number of people, and usually attended by spectators, as to worldly employment, when he declares "the right to rear a family with a becoming regard to the institutions of Christianity, and without compelling them to witness hourly infractions of one of its fundamental laws," to be one of the real and substantial interests which the legislature sought to secure by this enactment. As long as this law remains upon the statute book unchanged, it will be the duty of the courts to enforce it in the light of the Supreme Court's interpretation of its spirit and purpose. "Whilst . . . this act of assembly remains unaltered by the legislature, it is not to be frittered away by judicial legislation;" *Johnston v. The Com.*,

22 Pa. 102. The power to alter, amend or repeal it rests with the legislature alone. We conclude that in this case the exceptant was charged with a violation of the Act of April 22, 1794, 2 Sm. Laws, 177, which charge was sustained by the evidence set forth in the record, that the justice had jurisdiction in the premises, and that the record discloses no reversible error.

And now, to wit, July 8, 1913, all the exceptions to this record are dismissed and the judgment of the justice is affirmed.

Turtle Creek Borough vs. Pennsylvania Water Co., Appellant.

Boroughs—Water Companies—Rates—Valuation of plant—Act of April 29, 1874, P. L. 73, Section 74—Refunding of rates paid.

Conclusions supported by testimony will not be reversed by the Supreme Court. Where there is evidence to support a finding that the rates as established will yield a fair return upon the investment, a decree fixing such rates will be affirmed; and the court made no error in establishing the rate to yield a return of not less than six per cent. upon the valuation fixed by the court. The refunding of excess charged will be limited to the plaintiffs in the bills.

C. P. Allegheny Co., Nos. 132 Aug. T., 1911; 235, 278, 258, 300, 318, 257, Feb. T., and 1084, Apr. T., 1912. Bills in Equity. Supreme Court, Appeals Nos. 82 to 89, Oct. T. 1913.

George B. Gordon and Duff & Marmack, for appellants.

J. A. Langfitt, H. W. McIntosh, C. B. Prichard, C. C. Baldridge, S. J. McKim, J. N. Huston, J. R. Hindman, John D. Meyer, V. L. Barbor and S. H. Huselton, for appellees.

From 243 Pa. Supreme Ct. 401.

(A number of boroughs and individuals are joined as parties plaintiff in this case. The opinion and findings of the lower court are of interest and value but too lengthy to print; the essentials are found in this opinion.

Opinion by Mr. Justice Elkin, January 5, 1914:

The matters in dispute between the boroughs and the water company were presented to the court below for determination under the provisions of the Act of April 29, 1874, P. L. 73. The bills were filed by the boroughs to restrain the water company from shutting off the supply of water to consumers because of their refusal to sign contracts to pay increased rates, and to have the court inquire into the alleged unreasonableness of the proposed increase of charges in order that such decrease might be decreed as should be deemed just and equitable under the facts. The pleadings and testimony cover 1,385 pages of the appendix, while it requires ninety-five pages of the paper book to print the requests for findings of facts and of law, the opinions of the court below, and exceptions thereto. This shows how exhaustively the case was presented in and considered by the court below. Every question raised here was fully considered there, and nothing deemed material or helpful to their respective contentions was overlooked by the vigilance of counsel. The record is a satisfactory one because it shows most intelligent presentation by counsel and painstaking care on the part of the learned chancellor. Every question raised was given fair and full consideration, and our concern here will be to determine whether under the facts reversible error was committed in the application of the law. Both sides appealed from the decree and in the present cases we have to do with the appeals of the water company. Learned counsel for appellant state the two fundamental questions in all of the cases to be: (1) The value of the water company plant; and (2) the net earnings the company should be allowed as a fair return upon that valuation. There are seventeen assignments of error, but they all relate to the two fundamental questions just stated, and need not be discussed separately. It is strongly urged by counsel for appellant that the court below should have found as a fact under the evidence the value of the plant to be \$3,300,000, and that it was error to fix its valuation at \$2,750,000 as the learned chancellor did. It is argued that this result could only have been obtained by arbitrarily scaling down the valua-

tions placed upon the properties by the witnesses, or by the disallowance of certain items which should have been considered in arriving at a proper valuation for the purpose of fixing a basis upon which to compute the net earnings to which the company was entitled in order to secure a fair return upon the capital invested. The answer to this position must of necessity depend upon the fact whether the court did disregard the testimony and arbitrarily fix a valuation without reference to the proven facts. It has been necessary to read the testimony of a large number of witnesses in order to intelligently review the findings of fact upon which the court below based its conclusion as to the value of the plant. Having done so, we are not prepared to say that the trial judge either arbitrarily scaled down valuations placed on the plant by witnesses, or entirely eliminated certain items which should have been allowed in fixing the valuation. In considering this question it is important to remember that several witnesses testified as to the value of the plant, each witness having a theory of his own as to the proper method of ascertaining that value, and no two of them were in exact accord. It is true most of the expert witnesses called by defendant placed a higher valuation on the properties than the court fixed, but on the other hand, it is equally true that the testimony produced by the plaintiff would warrant a much lower valuation. In considering the question of valuation the learned court below said: "As is usual in cases of this class, a wide space exists between the testimony of the respective parties as to the value of defendant's properties, varying from \$1,584,354 by the plaintiff, and \$3,300,000, and more by one witness, on the part of the defendant." This is followed by a discussion of the testimony of the witnesses, Lyons, Crowther, Kuichling, Hawley, Forbes, Metcalf, Davison, Pence and Knowles. The discussion of the testimony of these witnesses amounts to a demonstration that the learned chancellor carefully considered the question of value from every angle, and did not act arbitrarily or capriciously in fixing the valuation of defendant's properties. No doubt counsel for appellant believe that the court should have accepted the statements of their witnesses as the best evidence of value, but the court was

not bound to accept their estimates of value as conclusive of the fact, but only to give it the weight to which it was entitled in connection with all the testimony in arriving at a just valuation. Upon the question of value the testimony was conflicting and it was the duty of the court to consider all of the relevant facts in fixing a fair valuation upon the properties. It may be, as appellant contends, that the weight of the testimony would justify a higher valuation, but the question for decision here is whether there was such palpable error in the findings of fact as to warrant a reversal of the decree. Appellate courts do not reverse findings of fact by a court of first instance unless there be manifest error. This is the rule of all the cases, and, as we view it, is conclusive against appellant on this branch of the case at bar. The testimony was ample to sustain the conclusion reached, and this is the limit of our inquiry: *Rora-baugh's Est.*, 229 Pa. 377. It is not ground for reversal on the findings of fact that a different conclusion might have been warranted from the evidence, or that this court might have arrived at a different result if called upon to determine the fact as a court of first instance: *Plankington's Est.*, 212 Pa. 235. Our duty in reviewing findings of fact, is to ascertain whether there was testimony, which, if believed, would sustain the findings: *Oil Well Supply Co. v. Manufacturing Co.*, 234 Pa. 378.

As to the items of "going value," interest during the period of construction, and the cost of repairing the streets, which appellant contends were not allowed, or at least that there were no distinct findings as to these items, we agree that these were elements to be considered in arriving at a just valuation of the properties, but we cannot agree that it was the duty of the court to set out in its findings each separate item of value and make the sum total of the separate items the final conclusion of the court as to the valuation of the entire plant. In the opinion of the court in banc on the exceptions to findings of fact and conclusions of law, it is stated that these items were not eliminated by the trial judge in fixing the valuation, but that they were given due consideration. It is further stated that the trial judge did consider "going value" as an element in fixing

the value of the plant as a whole. It is not so clear what disposition the court made of the item for street paving, but that it was not overlooked is shown by what the court stated in reference to the same. It may be that some of the items were undervalued, but in the valuation of the entire properties of a company of the magnitude of appellant, we would not feel warranted in reversing the decree on the ground that the learned court below may not have given due weight to some of the smaller items included in the total valuation. What we do decide now is that under all the evidence the valuation fixed by the learned court below is a fair one, and that we find no such error as would warrant a reversal of the decree on the ground of under-valuation. The same may be said as to the contention that the earnings of appellant under the rates established by the decree are insufficient to yield a fair return upon the capital invested. The rates must not be confiscatory and they must be such as to yield a fair return upon a just valuation of the plant. The elements to be considered in fixing the valuation, and what deductions should be allowed from gross earnings for maintenance and operation expenses, for payment of fixed charges for depreciation and sinking fund purposes, were fully considered by the lower court in the light of many adjudicated cases, and especially of our own cases: *Brymer v. Butler Water Co.*, 179 Pa. 231; *Pennsylvania Railroad Co. v. Philadelphia*, 220 Pa. 100. As to the law applicable to the facts of this case, we can add nothing of value to what has been so well said by the learned court below. We are not convinced that the conclusion reached will deny appellant a fair return upon a just valuation of its properties, or that any violence was done to the rights of the water company in the application of the law. It may be proper to suggest here that this conclusion is based upon the findings as they appear in the present record, and is not to be taken as a final adjudication of the rights of the parties for all time. If in the future it shall be made to appear that the net earnings of the company are not adequate to yield a fair return upon the value of its plant, the courts, or other proper tribunal, may be resorted to for the purpose of having the rates changed so as to meet the conditions

that may then be shown to exist. But upon the present record we find no sufficient reason to disturb the decrees entered by the court below.

We need but advert to the contention of appellant that the court had no jurisdiction to decree repayment to persons who are not named as direct parties to the bills. No authority is cited in support of this position. The bills were filed by the boroughs and two citizens and taxpayers thereof on their own behalf and on behalf of other citizens who are consumers of water. On this question we adopt with approval what was said in the opinion of the lower court sur exceptions to the conclusions and findings filed December 16, 1912. We agree that equity having assumed jurisdiction with respect to the general subject under consideration, especially when some of the prayers asked for this specific relief, the decree may be made broad enough to include every incidental question or dispute within the general purpose.

Decrees affirmed. The cost to be paid by appellant.

Turtle Creek Borough, Appellant, vs. Pennsylvania Water Company.

Water Companies—Contract with boroughs—Rates—Act of April 29, 1874, P. L. 73, Section 74.

A borough ordinance indefinite as to rates and time is revocable on notice under changed conditions. Upon injunction to prevent shutting off supply of water and from charging alleged unreasonable rates, where the court fixed the rates, the plaintiff cannot say that the court was without power under a valid contract. Where there was evidence of valuation as a basis for determining rates the decree will be affirmed. The relation of industrial rates and domestic rates not being established, the Supreme Court cannot say the court below erred in not giving due consideration thereto.

C. P. Allegheny Co., Nos. 132 Aug. T., 1911; 235, 278, 258, 300, 318, 257 Feb. T., and 1084, Apr. T., 1912. Bills in Equity.

Supreme Court, Appeals Nos. 156, 163, 157, 166, 158, 154, 155 and 202, Oct. T., 1913.

J. A. Langfitt, H. W. McIntosh, C. B. Prichard, C. B. Baldridge, S. J. McKim, J. N. Huston, J. B. Hindman, John D. Meyer, V. L. Barbor and S. H. Huselton, for appellants.

George B. Gordon and Duff & Marmack, for appellee.

From 243 Pa. Supreme Ct. 415.

(A number of boroughs and individuals are joined as parties plaintiff in this case. The opinion and findings of the lower court are of interest and value but too lengthy to print; the essentials are found in this opinion.

Opinion by Mr. Justice Elkin, January 5, 1914:

These are cross appeals by the boroughs and raise the following questions which will be discussed in their order.

1. The main contention of appellants is that the ordinances created a contract relation between the parties, or at least between some of them, which limited for all time the rates to be charged by the water company. The ordinance of the Borough of Turtle Creek, passed in 1895, contains the following provision: "The rates charged by said company for water furnished for domestic purposes, by contract or by meter measurement, shall not exceed the rates now charged for the same service by the City of Pittsburgh." The ordinance does not contain any definite schedule of rates, nor is it limited as to time. Upon this question the learned court below, *inter alia*, said: "On the contention that there exists a contract between the defendant and these several plaintiffs at the time the franchise was granted and permission given to enter into the borough, it is sufficient to say that where these contracts are for a definite period, they are binding; neither party can receive the benefits therefrom and at its will repudiate the conditions entered into originally. But where the contracts have expired, or where they seem to be indeterminate, they are revocable on notice, under changed conditions." To sustain this position the court cites the very recent case of *McCullough-Dalzell Crucible Company v. Phila-*

delphia Company, 223 Pa. 336. The great weight of authority everywhere sustains the view of the court; indeed this view is based upon a very conservative statement of the law in such cases. In a number of jurisdictions it has been held that it is against public policy for private parties to enter into contracts with public service corporations fixing rates to be charged either for a definite or an indefinite term of years so as to preclude judicial inquiry, or investigation by other tribunals constituted for the purpose, into the question of the reasonableness of such rates. We have not gone so far in Pennsylvania, but have uniformly upheld contracts of this kind for fixed and definite periods. This was prior to the Act of July 26, 1913, P. L. 1374, constituting a commission with supervisory powers over public service corporations, since which time we have not been called upon to consider the question. The effect of this act does not enter into the present case and will not be considered. The court below adhered to the rule of our own cases as to contracts for definite periods, and this was proper, but refused to extend the rule to contracts indefinite as to meter rates and unlimited as to time, which under the facts was a correct view of the law.

Again, this position of the boroughs is in direct conflict with the prayers of their bills and carried to a logical conclusion would deny them the relief specifically asked by them. The third and fourth prayers of the bill are:

3. "That your honors will hear, inquire into and determine as to the charges, and proposed charges, of the said Pennsylvania Water Company for the water so furnished your orators and other citizens and consumers of said borough."

4. "That your honors will decree that the charges and proposed charges of the Pennsylvania Water Company, defendant, assessed and charged to each of your orators, shall be decreased as to the said court may seem equitable and just."

All of the other prayers are predicated upon the power of the court under the Act of April 29, 1874, P. L. 73, to hear and determine the matters in dispute between the parties. The purpose of filing the bills was to invoke the exercise of the power conferred by the Act of 1874 upon Courts of Common Pleas to grant equitable relief. The boroughs took the initiative by

averring all the necessary facts to bring them within the general purview of the act, and laid the ground for inquiry into the question of the reasonableness of rates. The prayers of the bills, the facts averred, and the testimony introduced, all relate to the alleged unreasonableness of the rates, and this was the pivotal question upon which the case was made to turn. Having tried the case upon this theory at their own instance, the boroughs cannot now be heard to say that the court had no power to determine whether the rates established by the water company were unreasonable, and to fix rates deemed reasonable under the evidence, on the ground that this question was finally settled by the acceptance of the ordinances, which constituted valid contracts, binding not only upon the parties themselves, but upon the courts. To sustain this position would mean that the bills would have to be dismissed because of the failure of the boroughs to make out a case under the pleadings. The case was tried on the theory that it was one of rate fixing and that the court should determine under the evidence what constituted reasonable charges for the water furnished. The court tried the case upon the pleadings, took volumes of testimony in support of the respective contentions of the parties, and entered a decree deemed equitable and just under all the circumstances. In this state of the record, if no other question were involved, it would be necessary to say that the boroughs are not in position to deny the jurisdiction and power of the court to grant the relief sought in their bills. In addition it may be added that there was no provision in the ordinances of the City of Pittsburgh as to meter rates for domestic consumption, and therefore it cannot be said that the ordinances upon which appellants rely fixed any definite rates for water furnished through meters. Under this state of facts, the question of the reasonableness of meter rates must be deemed an open one, and if so, the court clearly had the power to hear the parties and determine under the evidence what was a reasonable charge for water so furnished.

We do not deem it necessary for the purposes of this case to discuss and decide whether a contract between a borough and a water company will be enforced if its provisions have the

effect of ousting courts of their jurisdiction to determine what is reasonable compensation for the public service rendered. In many jurisdictions it has been held that a contract as to rates is subject to modification or abrogation by legislative action, either direct or through the medium of a commission. Indeed, it must be conceded, that the whole trend of modern decision is in this direction, but we have not been called upon in Pennsylvania to finally decide to what extent the doctrine is applicable here, and since under the facts of the present case it is not necessary to do so, this will be left an open question for future determination.

2. Something is said in the argument as to the industrial rates for water furnished manufacturing establishments. This question was not raised by the pleadings and we do not see how it is possible upon review to consider it as a ground of reversal. The learned counsel for appellants in their printed argument concede that the pleadings did not raise the question of the unreasonableness of industrial rates, but insist that these rates should have been considered as sidelights for the guidance of the court in passing upon the reasonableness of the rates for domestic consumption. The answer to this position is that if deemed important this question should have been raised by proper averments in the bills, and this not having been done, there is nothing in the record upon which a court of review could undertake to say that the court below erred in not giving due consideration to the subject of industrial rates.

3. It is also strongly urged for appellants that the court below fixed too high a valuation upon the properties of the defendant company as a basis for determining what rates would yield a fair return upon the value of the whole plant. This question has been discussed in the appeals of the water company and it is unnecessary to repeat what was there said. It is apparent that the valuation of the properties fixed by the court is not satisfactory to either party. The water company asserts that it is too low, while the boroughs insist it is too high. It may be noted that as contended in the printed argument of their counsel the boroughs claim the valuation fixed by the court to be about \$600,000 too high, while the water company claims

that it is \$600,000 too low. It may be assumed that each side is putting its best foot foremost by claiming all that the evidence would justify in support of its contentions. The court took conservative ground and fixed the valuation upon a basis deemed fair and reasonable to all parties. We have already said that there was no error in this respect.

In conclusion, it may not be improper to remark, that these appeals contain many incidental and interesting questions of law, which we do not deem vital to the decision of the present case, and therefore have refrained from discussing or deciding them. These questions will arise under the Act of July 26, 1913, P. L. 1374, known as the Public Service Company Law, and it would be unwise to anticipate their decision at the present time and under the old law. That statute created a tribunal for the consideration of questions such as are here involved and we do not feel warranted in deciding in advance, when the necessities of the case do not demand it, many important questions which must be raised in the first instance under the new Public Service Corporation Act.

What we do decide now, and it is all we intend to decide, or that is necessary to be decided in the present case, is, that under the facts as shown by this record the decree entered by the court below is a fair and equitable adjudication of the matters in dispute between the parties. We find no reversible error in the matters brought to our attention by the assignments.

Appeals dismissed at the cost of appellants.

Stein et al. vs. Macungie Borough.

Cities and Boroughs—Condemnations—Waters—Act of April 15, 1907, P. L. 90.

The above act authorizing cities and boroughs to condemn property for water rights, including springs, is constitutional, and the title gives sufficient notice of the contents.

C. P. Lehigh Co., No. 60, April T., 1908.

Max S. Erdman and Francis G. Lewis, for plaintiffs.

Horace W. Schantz, for defendant.

Opinion by Trexler, P. J.:

The most serious reason urged, although not referred to at the trial, is that the act under which the borough proceeded is unconstitutional.

The act of May 25, 1887, P. L. 267, is an act entitled "to authorize cities and boroughs to condemn property and rights inside and outside of their limits for the purpose of obtaining water."

Although the title is very wide in its scope, the body of the act limits the taking to "streams known as rivers or creeks, lands, easements and rights of way."

The Act of April 15, 1907, P. L. 90, amends the above act. Its title is as follows: "To amend section 1 of the Act approved May 25, 1887, entitled 'An act to authorize cities and boroughs to condemn property and rights inside and outside of their limits for the purpose of obtaining and supplying water,' so as to include springs."

The section amended is properly cited. The section as amended contains the added word "springs" and the following proviso: "Provided, that no waters or springs appropriated under the provisions of this act shall be used in such manner as to deprive the owner or proprietor thereof of the free use of and enjoyment of the same at all times for any domestic, dairy, stock or farm purposes."

It is with the amendatory act we are concerned. The case was tried under its provisions, and the damages were ascertained subject to the owners' rights in the waters for certain purposes.

The plaintiffs contend that the subject of the act is not clearly expressed in its title, as provided by art. III, sec. 3, of the State Constitution.

There is no doubt the subject of the amendment is springs. The proviso applies not only to springs but to waters, and the legislative intent to extend the amendatory act to waters is not expressed in the title. But we need not consider that aspect of the case, for the case before us was the taking of a spring. The term waters may be limited to waters contained in springs, or the word waters may be rejected entirely and the continuity of the language of the act, or its completeness of expression, be

in no wise affected. There are a large number of cases recognizing the latter method of construing such acts. Among them are *Smith v. McCarthy*, 56 Pa. 359; *Com. v. Casey*, 43 Pa. Superior Ct. 494; *Dewhurst v. City of Allegheny*, 95 Pa. 437.

The question remains whether, in order to meet the constitutional requirement, the title of the act must give notice of the proviso reserving certain rights to the owners of the premises containing the springs. The title of amendatory or supplementary acts is liberally construed: *Stroudsburg v. Schick*, 24 Pa. Superior Ct. 442, and cases there cited. Where the title of the amendatory act specifies the nature of the changes made, its provisions are limited to the subjects specified in the title: *Com. v. Bender*, 7 Pa. C. C. Reps. 620, citing *Union Pass. Ry. Co.'s Appeal*, 81* Pa. 91; *Mauch Chunk v. McGee*, 81 Pa. 433; *Dorsey's Appeal*, 72 Pa. 192; *Beckert v. Allegheny*, 85 Pa. 191. The test is that the title should be so certain as not to mislead. The purpose of the act we are considering is the inclusion of "springs" into the Act of 1887. The title need not be an index to its contents, and all details naturally and properly incident to the subject named need not be referred to in the title.

That the owner of the spring has certain privileges left to him does not offend against the principle. It is no new subject, but deals expressly with the purpose of the act and is germane to the same. There is no variance from the real subject of the act so as to mislead any one, but any person interested in the subject-matter would be put upon his inquiry as to what is contained in the body of the act: *Stroudsburg Borough v. Schick*, 24 Pa. Superior Ct. 442; *Franklin v. Hancock*, 204 Pa. 110; *Bridgewater Borough v. Bridge Co.*, 210 Pa. 105.

I consider the act of April 15, 1907, P. L. 90, constitutional. Motion for new trial overruled.

Shenandoah Water Commission.**Boroughs—Ordinances—Chief Burgess—Meetings.**

Under the Act of 1851, P. L. 320, borough officers must meet statedly at least once a month and within ten days after election, and under the Act of 1893, P. L. 113, every ordinance must be presented to the chief burgess to make return to the next regular meeting, and council by failing to meet cannot make void the veto of the burgess filed with the secretary before the next regular meeting and in due time.

C. P. Schuylkill Co., No. 194, March Term, 1914. Petition for Water Commission.

M. M. Burke, for petition.

J. B. Reilly and B. V. O'Hare, contra.

Opinion by Bechtel, P. J., March 2, 1914:

This case comes before us on a petition presented to court, reciting, *inter alia*, that the petitioners are the president and secretary of the town council of the Borough of Shenandoah; that the said borough is a municipal corporation, regularly incorporated under the general borough law of said Commonwealth, enacted April 3, 1851; that the town council of the said borough did on the 6th day of November, 1913, enact an ordinance accepting the provisions of the Act of Assembly of the Commonwealth, approved the 5th day of June, 1913, and did in said ordinance direct the petitioners to make application to court on behalf of council for the appointment of Water Commissioners, as provided for in said Act, and a copy of the said ordinance was annexed to and made part of said petition.

At the same time there was presented to the court a petition signed by the minority members of town council of said borough, setting forth, *inter alia*, that the said ordinance recited in said petition was passed at a regular meeting of the town council on the 6th day of November, 1913; that the same was presented to W. J. Strollis, Chief Burgess of said borough, for his approval on the 17th of November, 1913, and returned with his veto and reasons therefor to the secretary of said council on

the date of its next regular meeting thereafter, November 20, 1913; that council did not meet on said date for want of a quorum; that a meeting of town council was held November 28th, 1913, at which time said veto was in the hands of the secretary of council, but no action was taken thereon by council, nor said veto nor the reasons therefor spread upon the minutes by the secretary, as required by law; that said chief burgess had no authority to withdraw his veto after the same had been duly returned to council, and that the ordinance under which the court is now asking to take action has never been regularly passed by council, and the court has no jurisdiction to make the appointments as prayed for.

While the matter was in the hands of the court, awaiting a hearing, another petition was presented to the court in the shape of an expunging ordinance which was passed by the town council of said Borough of Shenandoah on the 8th day of January, 1914, and approved the same day by William J. Brown, Chief Burgess, which said ordinance provided, *inter alia*, "That whereas the ordinance of the 6th of November, 1913, had never been legally or regularly passed by council nor legally advertised nor entered upon the minutes of the council, and had been disapproved by the chief burgess and no action taken thereon, the same has been illegally and irregularly entered in said ordinance book," and resolving that the said alleged ordinance be expunged from the records of this council, and that the solicitor be directed to withdraw same from consideration of court.

A hearing was held upon these petitions, at which it was developed that the ordinance was passed, presented to the chief burgess, vetoed and returned by him to the secretary of council, as set forth in the petition, and that there was no meeting of council for the transaction of business on the night of the 20th of November, owing to a lack of quorum.

A call was issued for a special meeting on November 26, 1913, and the meeting was called for the following purposes: "To consider and take action upon matters pertaining to Street Department and Fourth Ward sewer, Water Department and Law and Ordinance Department." Which said call was responded to by a majority of the town council, and a meeting held. At thi

meeting it was stated by the solicitor on the floor of the meeting that he understood that the ordinance asking the court to appoint a water commission had been vetoed by the chief burgess. The secretary was present, and at that time, according to his testimony, had in his possession the veto message of the chief burgess relative to this ordinance, but testified that he did not make known the same to the members of the town council, nor did he make any reply to the statement of the solicitor. The council, however, attempted at this meeting to pass said ordinance, and did pass the same in the shape of a resolution. Nothing further was done until the 1st of December, 1913, at which time the chief burgess withdrew his veto, and signed the original ordinance, a certified copy of which he had already vetoed.

We do not propose to consider in this opinion the effect of the expunging ordinance, so called, the power of council to pass the same, or the legality of its passage, for the reason that under our view of the case it is not necessary so to do. The question, as we view it, is, what was the effect of the action of the chief burgess relative to this ordinance, and what were his powers in relation thereto after the sending in of the veto message to the secretary of the town council.

The Act of 3rd of April, 1851, Article 3, P. L. 323, provides, "That it shall be the duty of the corporate officers to meet statedly at least once a month, and within ten days after the election of any corporate officer."

The Act of 23rd of May, 1893, Article 3, P. L. 113, provides: "Every ordinance and resolution which shall be passed by the said council shall be presented to the chief burgess of such borough. If he approve, he shall sign it, but if he shall not approve he shall return it, with his objections, to said council at the next regular meeting thereof, when said objections shall be entered at large in the minute book, and said council shall proceed to a reconsideration of such ordinance or resolution."

It is contended by counsel for the petitioners that the phrase "At the next regular meeting thereof," means a meeting at which a quorum shall be present, and that until such meeting shall be held the chief burgess may act as often and in as many different ways as he desires. We do not agree with this contention.

It will be noted that the case turns, under our view of it, upon the meaning to be given to this phrase. As shedding some light upon the construction to be placed upon the same, and the understanding of the legislature relative thereto, we cite the Act of 11th of April, 1862, P. L. 471, Section 3: "That the term 'stated meeting' or 'regular meeting' of a board of directors or controllers, whenever they occur in the act to which this is a further supplement, shall hereafter be taken to mean the first meeting thereof for organization after the annual election of directors or controllers, and the monthly or other periodical meetings held thereafter in accordance with the standing regulations of the board."

In the State, ex rel. Cline, vs. Wilkerville Township, 20th Ohio State Reports, page 287, it is said "By regular meeting is meant, no doubt, such meeting as the law requires to be held at a stated time and place."

The law requires at least one stated meeting of council to be held each month. In this borough there were two stated meetings to be held on the first and third Thursday of each month, and the 20th of November was a stated meeting night. The ordinance having been passed on a stated meeting night, on the 6th of November, 1913, a copy, duly certified by the proper officials was taken to the chief burgess by the high constable for his action on the 18th of November, 1913. The law required the chief burgess to return the same, with his action thereon, at the next regular meeting. The chief burgess complied with the law, and returned said ordinance to the clerk of the town council, with his veto, and a message accompanying the same setting forth his reasons therefor. In so doing, he discharged his full duty, and, as we view this case, his connection with said ordinance in an official capacity had ceased, and the ordinance was dead until reconsidered and passed over his veto by the town council. To accept the contention of counsel for the petitioners would put it in the power of the majority of the members of a town council to prevent the chief burgess from acting in relation to an ordinance upon which the law required him to act, and this we do not believe is in accordance with the letter or spirit of the Acts of Assembly governing this

case. To follow this reasoning to its natural and logical conclusion in this case—the ordinance was returned on the 20th of November. There were but two stated meetings to be held in the month of December, and in January the newly elected chief burgess would take his place. Could the town council, through neglect or refusal to do their duty, by absenting themselves at the regular meeting night, and transacting their business at meetings specially called, prevent the chief burgess from acting until the first Monday in January, and allow the new chief burgess to approve this ordinance if he saw fit to do so? It seems to us that to ask this question is to answer it. We do not believe that any court of justice, in the light of the Acts of Assembly and the decisions thereunder, could permit such action to be taken.

In Morrellville Borough's Annexation, 7 Superior Ct. R., 532, quoting from 546, it is said: "We agree with appellant's counsel that a majority of the members of council cannot effectually prevent the mayor from exercising his veto power by neglect or refusal to attend the special meeting thus called. If, therefore, as he asserted in the court below, the ordinance with his message vetoing the same directed to the common council was delivered unto the possession of its clerk at the special meeting on November 3, and the attention of the members present was called thereto, he did all that was possible for him to do; and when the mayor has done his full duty the statute is not to receive a construction that will make it possible for a recalcitrant majority of the council to nullify his veto by a bare refusal to do theirs."

It seems to us, in the light of these authorities and the language of the Act of Assembly, that it was the intention of the legislature, and is the reason and the spirit of the law, that a fixed time should be established at which the chief burgess should act upon the ordinances submitted to him. This fixed time was the next regular meeting of council, which time was fixed, and the date of which all knew. The fact that there was not a quorum present, which prevented the transaction of business, we do not feel can alter this time. To hold otherwise would be to fix a time of which no one could be aware, as no man could

tell in advance whether or not a quorum for the transaction of business would appear on the regular meeting night. Having, therefore, discharged his full duty, and, so far as he was concerned, killed said ordinance by his veto, could the chief burgess bring it to life again by signing another copy of it, or the original, after the time had gone by in which the law said he should act? We do not believe that the reason, the spirit or the letter or the Act of Assembly or public policy would permit such action to be taken.

And now, March 2, 1914, the petition for the appointment of a Water Commission in the Borough of Shenandoah is herewith dismissed at the cost of the petitioners.

Brumm, J. dissents.

Salvino vs. Borough of Monessen.

Streets—Negligence—Liability of Borough—Latent defects.

A plaintiff cannot allege one form of negligence and recover under another; to hold the borough responsible for latent defects the knowledge of the borough and its failure to cause the owner to remedy the defect must be shown.

C. P. Westmoreland Co., No. 94, Nov. Term, 1910. Motion for New Trial.

Walkinshaw & Walkinshaw, for motion.

A. M. Wyant, contra.

Opinion by McConnell, J.:

The plaintiff alleged in his statement that the area way to the cellar "was covered by double iron doors supported by iron hinges and certain movable bars or offsets." That on the date of the accident, "and long prior thereto, the iron hinges, bars and other support to said doors covering said area-way became worn and otherwise defective to such an extent as to render said covering or doors dangerous to persons using said sidewalk

in the ordinary means of travel, of which said defective and dangerous condition that said defendant had notice through its council and street commissioner long prior to the time of the accident hereinafter complained of, and notwithstanding said notice negligently and unlawfully permitted said area-way and covering to remain in said dangerous and defective condition." At the trial there was no pretense of proving any defect in "the iron hinges, bars and other support to said doors"—as alleged—nor proof of any notice to the borough that any defect of that kind existed. The hinges appeared to be in good condition both before and after the accident. The end of the doors next the street rested on either a stone or concrete sill. At the end next the building they were supported by angle irons which were not shown by the evidence to have been worn or defective in any way. Of course, the construction, whatever it was, was that of the owner of the premises, and not that of the borough.

Responsibility by the borough for a latent defect must be predicated on a failure by the borough to have the owner remedy the defect when it has either actual or constructive notice thereof. The plaintiff cannot allege one form of negligence and be entitled to recover on some different ground. He cannot ascribe the injury to one cause and be permitted, at the trial, to prove something different. The defect that the evidence discloses is not at all in the hinges or support to the door, but has relation to the rusting of one of the iron doors at the place where they join and overlap each other when closed. This defect the borough officials discovered by inspection, and, at once, proceeded to have it remedied. The rusted door was entirely removed and a new one substituted and thoroughly tested. This was about the 30th of March. The accident is alleged to have happened on the 5th of April. At the time of the accident, the only defect that the borough had knowledge of, no longer existed.

There is no conflict in the evidence about the kind of defect the borough had notice of, and that it was repaired in the manner above stated. It is not alleged that the manner of repairing was improper. The evidence, which plaintiff now claims, should have carried the case to the jury is the vague statement of one

Andy Corregio, who says that, on one occasion, he stepped on the door and it yielded to his weight. He is uncertain about the date of that occurrence, but thinks it was about the first or second of April. While he is uncertain about the date, he is certain that it was at a time which the old doors were both there, and that the reason of the door's yielding was not due to the causes assigned in the statement, but was owing to the rusted condition of the door at the point where they overlapped each other. That condition did not exist on the first or second of April, for the new door had been put in on the 29th or 30th of March. The most convincing proof of the date of the repair is to be found both in the evidence introduced by the plaintiff and the defendant. Looking at the condition of things, as he says it then was, and accepting his own confession of uncertainty as to the date, there does not seem to be any issue between him and the other witnesses to submit to the jury. What the witness says he is uncertain about we should accept as true. In any event, it has relation to a form of defect not mentioned in the statement. No evidence shows the form of defect alleged in the statement. No testimony shows notice of the form of defect therein alleged. No witness says that the defendant did not have repaired the only defect it was apprised of—and that this was not done prior to the time of the accident. The witness Corregio does not say that. With this point uncontested in the evidence, there was no basis for recovery—even if the statement had assigned the rusted condition of the door as the cause of the injury. "In an action against a city to recover damages for personal injuries caused by a fall on the defective sidewalk, a non suit is properly entered where it appears that the sidewalk had been repaired by the property owner eighteen days before the accident, and, during that time, the city had no actual or constructive notice of the defect which caused the plaintiff's injuries." *Rogers vs. Williamsport*, 199 Pa. 450. The pregnant fact that the only defect of which the borough was apprised had been repaired before the accident, and that it is not shown what defect did cause the accident, if it occurred, is sufficient to preclude a recovery. It is not shown that the cause of injury is due to any defect in constructing the repair—nor that it was due to the specific cause set out in the statement.

Why this motion was not earlier brought to the attention of the Court is unexplained. If presented soon after the trial it would have been possible to recall the evidence with more distinctness than is possible under present conditions. As we recall the testimony now, and as it appeared to us at the time of the trial, there was no evidence that would have sustained a recovery in favor of the plaintiff. It, taken as a whole, is consistent with freedom from actionable negligence. The motion and reasons for a new trial are all overruled.

In re Proceedings to assess benefits for Grading, Paving and Curbing.

Streets—Vacation of—Assessment of Benefits.

The owner of the fee to the vacated portion of a street cannot be assessed benefits for the part so vacated in a proceeding to determine the benefits and damages to a street which crosses the vacated highway.

C. P. Allegheny Co., No. 750, April Term, 1912. Exceptions to Viewers' Report.

Charles A. O'Brien, City Solicitor and Lee C. Beatty, Assistant City Solicitor, for City of Pittsburgh.

Chalfant & Over, for exceptants.

Opinion by Frazer, P. J., February 14, 1914:

In 1787, 2 Sm. L. 414, the Commonwealth by an Act of Assembly, laid out in "out-lots and in-lots" what was known as the Reserve Tract opposite Pittsburgh, and among the highways of that plan was Federal Lane, a street eighty feet in width extending from the Public Square in Allegheny to the Northern line of that tract. The territory included what is practically the entire City of Allegheny, now the North Side of the City of Pittsburgh. The portion of Federal Lane involved in this case was part of that street which was recently vacated by the City of

Pittsburgh. Upon the adoption of that vacating ordinance the fee of the land embraced within the street limits passed to the exceptant, Stephen Newburn. Subsequent to the vacation proceedings an ordinance was adopted by the City for the improvement of McIntyre Avenue, a public highway which passes through exceptant's property and crosses Federal Lane at right angles. Upon the completion of that improvement a Board of Viewers assessed benefits against abutting property owners, including exceptant, and also including in his land the strip eighty feet wide formerly Federal Lane. To the extent that the assessment imposed benefits on the eighty feet wide strip, Stephen Newburn filed exceptions.

At the argument the only exception pressed was the fifth, which denies the right of the City to assess benefits against that portion of his property which was formerly a part of Federal Lane. Exceptant contends that it was beyond the power of the municipality to pass the vacating ordinance, for the reason that the Commonwealth having laid out the Reserve Tract and established Federal Lane as one of its public highways, that street must remain public forever, unless vacated with the consent of all owners of lots in that plan. That Federal Lane was a public highway is not the least doubtful. In *Commonwealth vs. McNaugher*, 131 Pa., 61, it is said: "From the time that Federal Lane was established as a public highway, more than a century ago, every citizen in the Commonwealth had, and still has, a right to lawfully use it and every part of it, either on foot or otherwise. It required no act of acceptance on the part of anyone to make it a public highway. It became such by the act of sovereign power by which it was established."

Recent decisions of our appellate Courts are to the effect that streets laid out in plans and approved for public use by private parties implies a grant or covenant to purchasers of lots that all streets in the plan shall remain open forever to the use of the public: *O'Donnell vs. City of Pittsburgh*, 234 Pa., 401. In this case, in our opinion, the rule is not changed by the Reserve Tract having been laid out by the Commonwealth. We can see no difference in principle between this case and *O'Donnell vs. Pittsburgh*, *supra*. If a sale of lots in a plan laid

out by an individual implies a covenant that the streets in the plan shall remain open for the benefit of lot owners and the public generally, highways in a plan laid out by the Commonwealth should also be preserved for the owners of lots in that plan, especially, if, as in this case, laid out previous to the passage of the Act of 1836. The cases cited upon the brief of the City Solicitor have not convinced us that a different rule should be laid down in this case than that laid down in *O'Donnell vs. Pittsburgh*, *supra*. In view of what was said in the case above referred to, we are of opinion that the fifth exception should be sustained.

And now, to wit: February 14th, 1914, to the extent that the Viewers' Report assesses benefits against exceptant for the land embraced within the lines of Federal Lane, this exception is sustained; in other respects the exceptions are dismissed.

Leader Printing and Pub. Co. vs. Cauffiel, Mayor of Johnstown.

Ordinances—Special Legislation—Ministerial Duties—Canopies over sidewalks.

A municipal ordinance is not a law within the meaning of Section 7 of Article III of the Constitution. Where the ordinance prescribes that a permit shall be issued by the mayor after the approval of the city engineer, the mayor's duties are ministerial only and a mandamus will lie. Permission to erect canopies over awnings will operate to repeal an ordinance prohibiting encroachments passed thirteen years before.

C. P. Cambria Co., No. 329, December Term, 1912. Mandamus.

F. P. Barnhart, for plaintiff.

W. D. Lloyd, City Solicitor, and Tillman Saylor, for defendant.

Opinion by Stephens, P. J., Aug. 5, 1913:

The plaintiff in this case presented its petition on Oct. 22, 1912,

praying that an alternative mandamus issue to the defendant, as Mayor of the City of Johnstown, commanding him to issue a permit authorizing the plaintiff corporation to erect and maintain upon and over the sidewalk at the main entrance to its building at No. 221 Franklin Street, in the City of Johnstown, a canopy or awning as approved by the City Engineer and the councils of said city in joint session, as provided by Special Ordinance No. 597 of said city.

The petition filed by the plaintiff avers that it is a corporation existing under the laws of the Commonwealth of Pennsylvania and engaged in the general publishing and newspaper business, with its principal office and place of business at No. 221 Franklin Street, in the City of Johnstown, Pennsylvania, and is the lessee of said building in which said business is conducted by them. They further aver that the City of Johnstown is a city of the third class, organized under and by virtue of a charter from the Commonwealth of Pennsylvania, dated Dec. 18, 1889, and is by virtue of said charter vested with all the rights, powers and privileges of cities of said class in this Commonwealth. That among the powers and privileges so vested by law in the said City of Johnstown is the following: "To make and establish such and so many uniform rules and regulations as to them may seem expedient for the better regulations of porches, porticoes, benches, doorsteps, railings, bulk, bay or jut-windows, areas, cellar doors and cellar windows, signs and signposts, boards, poles or frames, awnings, awning posts or other devices or things projecting over, under, into or otherwise occupying sidewalks."

The petitioner further alleges that, pursuant to this power and other power conferred by the laws of the Commonwealth of Pennsylvania, that the City of Johnstown, on Oct. 7, 1903, passed an ordinance, known as Special Ordinance No. 597, entitled "An ordinance relating to and authorizing the issue of permits to the owners and lessees of buildings, for the erection and maintenance of canopies or awnings upon the sidewalks at the main entrance to such buildings, providing as follows:

"Section 1. Be it enacted and ordained by the Select and Common Councils of the City of Johnstown, and it is hereby

enacted and ordained by the authority of the same: That it shall be lawful for the Mayor of the city to issue to the owner or lessee of any building within the City of Johnstown a permit authorizing such owner or lessee to erect and maintain upon and over the sidewalks of the city at the main entrances to any such building a canopy or awning; provided, however, that no such permit shall be issued until the plans and specifications therefor have been filed with the City Engineer and shall have been approved in writing by him and referred to councils for their approval."

It is further averred by the petitioner that, on or about the day of July, 1912, it filed plans and specifications with the City Engineer for his approval and that of councils, as provided for by Special Ordinance No. 597, and that said plans and specifications were by the said City Engineer and the city councils in joint session approved, and that request was made of Joseph Cauffiel, Mayor as aforesaid, for a permit, as provided for by Special Ordinance No. 597, and that the permit requested was refused by the said Mayor; hence, the application for the writ of alternative mandamus.

By the answer filed November 24, 1912, these facts are with one exception admitted, but it is urged that Special Ordinance No. 597 is invalid for the reason that it is special legislation and is in contravention of the provisions of Section 7 of art. III of the Constitution of Pennsylvania, which prohibits granting to any corporation, association or individual any special or exclusive privilege or immunity. The answer further denies that the plaintiff filed the plans and specifications as recited in plaintiff's petition, and that the approval of the plaintiff's plans for a canopy was without authority of law, unless the same was accompanied by the specifications, and that the approval of said plans without the same being accompanied with the specifications was illegal; and, further, that said special ordinance does not impose a legal duty upon the Mayor to issue a permit in this case, and that section 8 of General Ordinance No. 48, approved Oct. 23, 1890, forbids the encroachment upon any sidewalk, street, square or alley within the city.

The counsel for the defendant sums up his defence in two propo-

sitions: First, that Special Ordinance No. 597 is illegal and confers no rights upon the plaintiff and imposes no duty upon the Mayor to issue the permit for the erection of the said canopy; and, second, that the erection of said canopy is in violation of section 8 of General Ordinance No. 48.

From this we find the issue to be defined under the petition and answer to the following questions—it being conceded that these are the only questions in issue: First, is Special Ordinance No. 597 special legislation in the sense that the same offends against the provisions of Section 7 of art. III of the Constitution of Pennsylvania? and, second, does this, if correct, nullify or make inoperative said Special Ordinance No. 597? If it does not, then does section 8 of General Ordinance No. 48, make it illegal to erect an awning or canopy so as to justify the Mayor in refusing to issue the permit applied for by the plaintiff company? These being the only questions raised by the petition and answer, upon the solution of these depends the final question of whether or not it is the duty of the Mayor, under the circumstances, to issue the permit asked for by the plaintiff.

We are of the opinion, and so decide, that the duties of the Mayor, under the terms of Special Ordinance No. 597, are ministerial only; that is to say, the preliminary questions as to whether or not the applicant for a permit to erect a canopy or awning has complied with the requirements of Special Ordinance No. 597 are specifically imposed upon the City Engineer and the city councils for solution and determination, and they having once passed upon the matters properly submitted to them, their conclusions became an accomplished fact, and, if favorable to the applicant for a permit, the applicant's rights under that official act are established and the procedure from that moment has passed the discretionary period. Hence, it naturally follows that the right having been established to the permit, and the ordinance declaring "that it shall be lawful for the Mayor of the city to issue to the owner or lessee of any building within the City of Johnstown a permit," it becomes the ministerial duty of the Mayor to issue the permit upon application. Where a right has been established, and it is made lawful for a public officer to perfect that right by the performance

of some duty, it follows as a legal conclusion that the refusal by the officer to perform that duty should not be permitted to nullify the vested right or privilege conferred; hence, we conclude, so far as this branch of the case is concerned, that when the City Engineer and councils, in joint session, passed upon and approved the plans and specifications of the applicant, it was the duty of the Mayor, upon application, to issue the proper permit that the right granted might become operative, agreeably to the provisions of Special Ordinance No. 597 of the City of Johnstown.

It was set up in the defendant's answer that the application for this permit was not accompanied by a specification. While this was not strongly urged, yet it is proper to say that an examination of the plans will disclose that they also specify the materials proposed to use, size of the supports, etc., and what further particulars should be required to be furnished to the engineer and councils, that they might have the information sought by them, is not stated. But, apart from this question of fact, with which we have nothing to do, it is sufficient answer to this position to recall the fact that Special Ordinance No. 597 vests in the City Engineer and councils the very question here raised. They are the forum duly constituted by the said ordinance to pass upon and to determine the sufficiency of the plans and specifications, as well as the adaptability of the proposed awning or canopy to the building, street and location upon which the same is to be erected.

As to the contention on the part of the defendant that Special Ordinance No. 597 is special legislation and in conflict with Section 7 of art. III of the Constitution of Pennsylvania, it would seem to be well founded, if the provision of the Constitution referred to was applicable to a municipal ordinance. A special law within the meaning of the Constitution has been defined to be "one applicable to less than a class of subjects," or, as an example, "the granting to any corporation, association or individual any special or exclusive privilege or immunity." Sanderson on the Validity of Statutes, page 98. But, however, the provisions as to local and special legislation apply only to the general assembly. Section 7 of art. III of the Constitution of

Pennsylvania, in part, reads as follows: "The general assembly shall not pass any local or special law, etc. . . ." The constitutional limitation relating to local and special legislation has reference only to the general assembly; they are not permitted to pass such legislation, and the provision referred to is not a limitation upon the legislative power of a municipality. A municipal ordinance is not a law within the meaning of the Constitution when that term is used in reference to the subject under consideration: Sanderson on the Validity of Statutes, page 107; Baldwin v. The City of Philadelphia, 99 Pa. 164. In the case of Klingler et al. v. Bickel et al., 117 Pa. 326, Justice Paxson said, in discussing the question of the application of this constitutional limitation to municipal ordinances: ". . . It by no means follows that when the legislature by a general law confers upon a borough the power of regulating its local affairs, it may not do so by ordinances that are special in their character."

We, therefore, conclude that the limitations of Section 7 of art. III of the Constitution of Pennsylvania is not applicable to Special Ordinance No. 597 of the City of Johnstown.

The only remaining question is whether or not section 8 of General Ordinance No. 48 of the City of Johnstown, approved Oct. 23, 1890, which provides; ". . . That after the passage of this ordinance, no encroachment shall be made on any pavement or sidewalk, etc., . . ." qualifies or limits the scope of the Special Ordinance No. 597, under which the claim is made by the petitioners for the permit in question and which was approved Oct. 7, 1903. As to this question, the well-known and primary rules governing the interpretation of statutes makes clear this question, if any there be, as to the effect of General Ordinance No. 48 upon Special Ordinance No. 597. It will be seen that Special Ordinance No. 597 was passed almost thirteen years later than General Ordinance No. 48; therefore, if these ordinances are in conflict—a point we do not here decide—the later ordinance operates as a repeal of the former, in so far as they are in conflict with each other, and from this we conclude that the full operation of Special Ordinance No. 597 is in no way modified or limited by General Ordinance No. 48.

From this, we conclude, and so decide, that The Leader-Printing and Publishing Company, a corporation and lessee, is entitled to a city permit authorizing it to erect and maintain a canopy or awning, in conformity with the plans and specifications approved by the City Engineer and councils, in front of the building, occupied by it as lessee as aforesaid, at No. 221 Franklin Street, in the City of Johnstown, Pennsylvania, and that it is the duty of Joseph Cauffiel, as Mayor of said city, to issue to the said Leader Printing and Publishing Company said permit for the purpose aforesaid.

And now, Aug. 5, 1913, after full hearing and upon due consideration, it is ordered, adjudged and decreed that a peremptory writ of mandamus in favor of the plaintiff and against the defendant be, and the same is hereby awarded, commanding the said Joseph Cauffiel, as Mayor of the City of Johnstown, to issue to the plaintiff, The Leader Printing and Publishing Company, a permit to erect a canopy or awning in front of the building occupied by it at No. 221 Franklin Street, in the said City of Johnstown, Pennsylvania, in accordance with the certificate of approval of the plans and specifications by the City Engineer and as referred to and approved by the city councils, in joint sessions, on July 16, 1912.

And it is further ordered, adjudged and decreed that the defendant pay the costs of this proceeding.

Joyce vs. The City of Pittston, et al.

Municipal Contracts—Street lighting—Discretion of authorities.

Where the time to receive bids and erect a lighting plant is not so short as to impute fraud, the ordinance will not be declared void on that ground. The discretion of the municipal authorities is supreme as long as it is not abused, and close margins of opinion and mere preponderances of proof do not constitute abuse.

C. P. Luzerne Co. In Equity.

J. T. Lenahan and W. L. Pace, for plaintiff.

B. R. Jones, J. P. O'Boyle, M. J. Mulhall, W. H. Gillespie,
for defendants.

Opinion by Fuller, P. J., December 30, 1913:

Upon the presentation of this bill with proper affidavits, the defendants having promised to maintain the status in quo, the case has been heard with the same effect as upon a motion to continue a perliminary injunction although the writ was not actually issued.

The prayer of the bill is for an injunction restraining the municipality and its authorities "from awarding a contract for the lighting of the streets and alleys of the city of Pittston" under a certain special ordinance inviting proposals on terms which are asserted to make the ordinance "arbitrary, unreasonable, discriminatory, indefinite, vague, unjust and therefore void because,

"(a) It invites bids on one hundred and fifty-four or more, arc lamps, and on one hundred and fifty-four, or more, incandescent or tungsten lamps, and includes the furnishing of such additional arc and incandescent lamps as may be required by the city during term of contract. The number of lamps required being uncertain and unlimited and dependent on future action of city council, and term of contract being unknown, the insufficiency of the information opens the door to favoritism and fraud in its varied forms.

"(b) It limits the bidding on arc lamps to one type of lamp owned and controlled by the General Electric Company and excludes competition on arc lamps owned or manufactured by other companies, thereby preventing the securing by the city of better illumination furnished by lamps other than the one arc lamp type referred to but also imposing additional cost and expense upon your orator and the other taxpayers of said city contrary to law.

“(c) It not only bars competition on the kind of arc lamp to be made the basis of contract, by confining the bids to a particular article in advance of the bidding, but also thereby deprives the taxpayers of better illumination at a less cost, which would result were bidders permitted to bid in open and fair competition on more than one kind of arc lamp.

“(d) It savors of favoritism and discrimination in favor of the company now lighting said city by changing the time of nine months heretofore provided for installation to the unreasonable time of four months, and by providing that if contractor is in a position to do so, and company now lighting said city is the only company in such a position, he shall ‘light the city streets, alleys and public places with arc and incandescent lights of number and locatioin each as at present being operated, and of equal candle power each.’

“(e) It selects in advance and without fair legal competition arc lamps and illumination in violation of the provisions of law requiring that contracts such as the one herein referred to be awarded to the lowest responsible bidder.”

When the bill was presented, we intimated that we would limit consideration to the claims, (1) of monopoly in respect to the arc lamp, (2) of unreasonably short time fixed for installation.

The ordinance was regularly adopted on December 10, 1913, is correctly quoted in the bill in full, and so far as it relates to the points suggested for consideration provides in substance that the City of Pittston enter into and execute a contract for lighting its streets, etc., with arc and incandescent lights, that proposals be invited for a contract of five or ten years, that the arc lamps should be of the type known as series luminous or magnetite, and “if the corporation awarded the contract is not in a position to immediately light the streets of the city in accordance with the specifications, contract shall be executed as provided for in ordinance and the successful bidder is hereby granted four months from date of contract becoming effective to make the necessary installation, and during the interim contractor may and, if in a position to do so, shall light the city streets, alleys and public places with arc and incandescent lights of number and

location each as at present being operated, and of equal candle power each."

No evidence was offered to establish the monopoly in respect to arc lamps, and therefore that point is eliminated, leaving for consideration only the proposition that the period of four months is unreasonable and discriminatory, on which considerable evidence has been submitted by both parties.

If it be true, and we believe it to be true, although not proved, that the field of electric lighting in Pittston is already exclusively occupied by a certain corporation with a plant fully equipped to meet the proposals of this ordinance, there is surely persuasive reason for believing as we do believe, that this corporation enjoys enormous advantage over all competing bidders in respect to the limitation of four months, and we might even be warranted in suspecting, though we refrain from declaring our suspicion against the honorable and trusted citizens of Pittston who are defendants, that the limitation may have been actuated by friendly feelings toward that same corporation; but all this goes for nothing unless we can draw from the evidence the unequivocal conclusion that the limitation is so unreasonable as to warrant our interference.

The discretion of the municipal authorities in matters of this kind is absolutely supreme and courts have no right to interfere with its exercise so long as it is not abused, and in determining whether or not it is abused, we have no right to be governed by close margins of opinion or by mere preponderances of proof.

In the present case, according to some witnesses, the installation could not possibly be accomplished *de novo* within four months, according to others it might be, and while we are convinced by the general effect of all the testimony that such a period is altogether too brief for a prudent contractor to accept, this conclusion does not unequivocally establish an abuse of councilmanic discretion, but at most only a lack of councilmanic intelligence, which we are thankfully unauthorized to enlighten.

We cannot find from the evidence that the time fixed is so grossly and palpably inadequate that the ordinance should be declared void on that ground.

It is significant that three bidders were willing to take the

chance, two of whom are indeed suggested, without proof, to be in collusion with the corporation above mentioned, but the third is not justly open to that accusation, being represented by one of the attorneys for the plaintiff in this proceeding.

It should further be noted that forfeiture of the contract is not specified as the result of failure to complete within the exact time, nor is there even any penalty imposed for delay, and therefore liability to the city for damages, if any, resulting therefrom, would be perhaps the only inconvenience which the accepted bidder would suffer.

The plaintiff has not made out a case which warrants our interference; therefore the motion for a preliminary injunction and to continue the same, is denied.

George vs. Kelly.

Boroughs—Councilmen—Oath of Office—Election certificate.

The Act of 1851, P. L. 320, requires all borough officials to subscribe to an oath of office before assuming their duties. The town council must recognize a member presenting an election certificate properly signed.

C. P. Schuylkill Co., No. 1, March Term, 1914. In Equity.
George M. Roads and George F. Brumm, for plaintiffs.
C. E. Berger and J. B. McGurl, for defendants.

Opinion by Bechtel, P. J., March 2, 1914:

This case comes before us on a bill in equity, in which it is recited, inter alia, that the complainants, with the exception of Charles Phillips, are members of the town council of the corporation of the Borough of Minersville, and the majority of the same, and that Charles Phillips was the town clerk; that the respondents are members of the town council; that Joseph Conlin was a member of that body, whose term expired January 1st, 1914, and John Brennan and Winfield Smith are citizens of the said Borough of Minersville, and John B. Mc-

Gurl is a member of the Schuylkill County Bar, and was the borough solicitor in 1911, and was the legal adviser of the respondents; that by virtue of an Act of Assembly approved June 19, 1911, P. L. 1047, a general election was held in the Borough of Minersville, whereby certain councilmen were elected; that under the provisions of the Act of May 20, 1913, a general election for councilmen was held; that among those returned elected were Evan Jenkins and George Young, from the Third Ward; that in pursuance of the requirements of said Act, the members of council met in the council chamber for the purpose of organization in January 5, 1914, at eight o'clock P. M., and elected William George chairman and Charles Phillips secretary of the temporary organization; that certificates of election, duly signed by the duly authorized judge of election of the Third Ward, certifying that Jenkins and Young had been duly elected members of the town council of the Borough of Minersville, for the Third Ward thereof, together with the respective oaths of office taken by them before a Justice of the Peace, were filed with the said secretary of the meeting; that a motion was made to seat Young and Jenkins as members of the council on which said motion, Jenkins, Young and Conlin having been excluded, the vote was a tie, and the motion declared to have been lost; that thereupon considerable discussion was had, which at times became very animated and heated, and that as a result thereof the complainants announced the adjournment of the meeting, through William George, temporary chairman, to another hall; that the respondents remained in the original council hall; and each party effected an organization and claimed to be the town council of the Borough of Minersville. These facts are practically not disputed. The bill having been presented to court, a preliminary injunction was issued, restraining the respondents from interfering with the complainants in the transaction of the business of the borough. On a hearing to continue or dissolve the preliminary injunction, the injunction was maintained, and an answer having been filed to the bill, the case is now before us for final disposition.

It is contended by counsel for the respondents that the litigation involves the title to the office of the two councilmen from

the Third Ward, and that, therefore, the court is without jurisdiction in this case.

That we cannot settle the title to an office by a bill in equity is too well settled to require the citation of authorities; and were that the sole question involved in this case we would feel impelled to dismiss the bill. But the fourth prayer for relief is as follows: "That the respondents, or any of them, be restrained from issuing any orders upon the treasurer of the said borough, Louis F. Bausch, or upon any other persons, for the payment of moneys, or directing any other official or employee of the borough to perform any service for or on behalf of the town council."

We are of the opinion that we have jurisdiction to dispose of this case on the record as it stands before us with relation to this prayer for relief, for the reason that to permit two bodies of men, each one claiming to be the town council of the Borough of Minersville, to issue orders upon its treasurer, or to give conflicting instructions to its employees, would result in endless confusion, and possibly injury to innocent parties.

The Act of 3rd of April, 1851, Article 3, P. L. 325, provides, *inter alia*, that before entering upon the duties of their offices the officials of the borough shall take and subscribe an oath or affirmation before a Judge or Justice of the Peace in the proper County, and prescribes the form of oath which shall be taken. In this case Evan Jenkins and George Young presented themselves at the proper time and place with their credentials in the shape of certificates of election signed by the judge and inspectors, and their oaths of office taken before a Justice of the Peace, and sought to participate in the transaction of the business of the council. This council refused to permit them to do, claiming that as their terms of office were not designated they were not properly elected. With this contention we have nothing to do at present. The fact that they had, each of them, a certificate of election, properly signed, and an oath of office, proper in form and administered by a proper official, in our opinion constituted them *de facto* councilmen from the ward which they sought to represent, and entitled them to their seats in council. There was nothing more that they were re-

quired to do, and our attention has not been called to any authority which confers upon the town council the right to go behind those returns and to determine whether or not these parties were properly elected and entitled to their seats in the body. There is a method prescribed by law, by which all this may be questioned, which method may be pursued if it is thought proper so to do, and our conclusion in this case is reached and entered without prejudice to the proper parties trying out these matters at the proper time and in the proper manner.

We, therefore, find as facts:

1. That the Town Council of the Borough of Minersville met for the purpose of organizing according to law on January 5th, 1914, and duly organized by the election of William George temporary chairman, and Charles Phillips, temporary secretary.

2nd. That there were present at that meeting the following named persons whose rights as members of said council were not questioned: Martin Kelly, John Dando, William George, Allen Keller, James Maurer, Walter Tresize, F. J. Bender, J. C. McCrystle, Evan Jenkins, Thomas Boran, George A. Merkle and George Young.

3rd. That the respective certificates of the proper election officers of the Third Ward of the Borough of Minersville, certifying that George Young and Evan Jenkins were duly elected to the office of councilman for the Third Ward of the said borough, at the election held the 4th day of November, 1913, together with their respective oaths, as required by law, were duly filed personally by said Young and Jenkins with the secretary of the council, in open meeting, at the time of the organization on Monday, January 5th, 1914.

4. That council did not, at this meeting of January 5, 1914, by any official vote, determine who, prima facie, were entitled to sit as members of the council.

5. That the right of Young and Jenkins to sit as councilmen was put to a vote which resulted in a tie.

6. That George, McCrystle, Keller, Tresize, Maurer, Jenkins and Young withdrew from the council chamber.

7. That William George, at the meeting to be held January 8, 1914, in the council chamber, notified all the members pre-

sent to adjourn to Woodward's hall, and invited all qualified members of council to attend.

8. That at that meeting council duly organized by the election of a president, secretary and solicitor.

CONCLUSIONS OF LAW.

1. That it is the duty of the town council of the Borough of Minersville to recognize as a member of its body one who holds a certificate signed by the proper election officers, and who qualifies by filing his oath required by law.

2. The certificate of election which is sanctioned by law or usage is the prima facie written title of the office, and can be set aside only by a contest in the form prescribed by law.

3. George Young and Evan Jenkins are prima facie entitled to be seated and counted as members of the town council of the Borough of Minersville.

4. That equity has jurisdiction to grant relief, to restrain acts contrary to law and prejudicial to the interests of the community for which there is no adequate legal remedy.

AND NOW, March 2, 1914 it is ordered, adjudged and decreed that the preliminary injunction heretofore granted in this case be and the same is hereby made permanent, and Martin Kelly, John Dando, F. J. Bender, Thomas Boran, George Merkel, Joseph Conlin, John Brennan and Winfield Smith are hereby restrained, either as a body or individually, or by their servants or agents, from in any way interfering with the organization of the town council of the Borough of Minersville as organized on January 8, 1914, at Woodward's hall, Minersville, Pa., with William George president and Charles Phillips secretary, and from in any way hindering, delaying or preventing that organization from conducting and managing the affairs of said borough, and from exercising or attempting to exercise any authority, either individually or as a body, relative to the government of said borough, or in the administration of its affairs, excepting the exercise of such rights as belong to such of the respondents as are members of council.

Morton Borough vs. Smith.**Boroughs—Sidewalks—Curbing and Guttering—Liens.**

An immaterial change in grading or filling is not sufficient to prevent a recovery on the lien filed. The section of the Act of 1851, P. L. 320, imposing a penalty of twenty per cent. is repealed by sections 19 and 20 of the Act of 1901, P. L. 364. Penal statutes should be strictly construed.

C. P. Delaware Co., No. 33, March Term, 1911. Municipal Lien.

W. R. Fronefield, for motion.

W. C. Alexander, Borough Solicitor, contra.

Opinion by Bloomall, J., April 6, 1914:

This cause was a sci. fa. sur municipal lien. The municipal lien was filed against the property of the defendant for work and materials in the construction of curbing and guttering in front of the defendant's property. The work and materials were done and furnished in accordance with an ordinance of the plaintiff borough approved May 6, 1908, which is inter alia "every owner of lands abutting on any street or avenue, which is or shall have been brought to the established grade, shall x x x set curb and construct gutters according to the provisions of this ordinance." The affidavit of defence filed by the defendant avers that the street had not been brought to the established grade, but the case went to trial on the plea of non assumpsit, payment, with leave to give special matter in evidence, and with notice of the allegations of the affidavit of defence. The reasons filed in support of this motion complain that the defendant was not permitted to prove that the street had not been brought to the established grade, and that error was committed in permitting the plaintiff to recover a twenty per cent. penalty, and that error was committed in not holding that the ordinance of May 6, 1908, had been repealed. Upon the trial we held that if the sidewalk of the street required no material grading of filling that part of the street had been brought

to the established grade. It is not necessary that the ground where the curb stone and gutter are to be set and constructed shall be in absolute conformity with the established grade. In this case the deviation from such absolute conformity was but a few inches, and it did not appear that any material difference in expense was incurred in setting the curb and constructing the gutter by reason of the few inches of such deviation. As to the ground of the street between the gutters, being the wagon way thereof, it appeared that the street had long been open and adjusted to travelling, and that there was no material difference from the established grade. It presented no difficulty whatever to the defendant for use in obtaining the materials for the curbing and guttering. The defendant did not propose to show such material difference that we could have held that the street had not been brought to the established grade. Hence we see no error in this respect.

We do find error in the recovery of the penalty. By the Act of April 3, 1851, P. L. 320, section 2, clause V, Stewart's Digest, Vol 1, page 494, pl. 90, the borough is empowered to collect the cost of the work and materials with twenty per centum in advance thereon. The Act of June 4, 1901, P. L. 364, was intended as stated in the last clause of the act to "furnish a complete and exclusive system in itself, so far as relates to the practice and procedure for the filing, collection and extent of tax and municipal claims," and so much of the Act of April 3, 1851, as refers to the extent of the lien and the practice or procedure in enforcing payment as is contained in the Act of 1901 is repealed. By the nineteenth and twentieth sections of the Act of 1901, it is provided that if no defence is interposed a five per cent. attorney's collection fee, not exceeding twenty dollars, may be recovered, and if a defence be interposed, and the plaintiff shall recover more than the amount admitted, a like collection fee shall be included. This is the only reference to the subject of a penalty or anything analogous thereto. The question arises whether this is a substitute for the twenty per cent. advance provided by the Act of 1851. The rule of strict construction is to be applied to penalties. We are inclined to the opinion that the twenty

per cent. under the Act of 1851 was to cover the cost of collection. This being so, the five per cent. under the Act of 1901 is the same thing. We see no good reason why the municipality should recover twenty per cent. in addition to the cost of the work and materials and further mulct the property owner into five per cent. attorney's collection costs. This question was not raised by the affidavit of defence, but the plaintiff ruled the defendant to plead generally, and a general plea as heretofore referred to was filed. We are, therefore, of opinion that the plaintiff must abate from the verdict the difference between twenty per cent. penalty, \$10.40, and a five per cent. collection fee, \$2.60, making \$7.80.

It does not appear that section 1 of the ordinance of May 6, 1908, has been superseded or repealed in the respect now under consideration by the ordinance of May 5, 1909, to which the defendant refers.

Being of opinion that there has been no error in the trial of this case, except that which refers to a part of the penalty, and that there is a little error in that respect, we must make the defendant's rule for a new trial absolute, unless the plaintiff shall, within 10 days, abate seven dollars and eighty cents from the verdict in this case, and if the plaintiff shall file such remittitur within 10 days, the defendant's rule for a new trial is discharged.

Com. Penn'a. ex rel., Riley, vs. Durkin, et al.

Boroughs—Election of Councilmen—Defective Ballots.

(This case is the same as was reported on page 196 of this volume, March, 1914, issue. Additional reasons are presented and a re-hearing asked for, but the prayer of the petition is refused.)

C. P. Luzerne Co., No. 519, January Term, 1914. Petition of Open Judgment.

E. C. Jones, for plaintiff.

T. F. Farrell, for defendants.

Opinion by Woodward, J., February 9, 1914:

The respondents in the above case petitioned the Court to open judgment and for a re-hearing, basing their petition on three grounds: First, because the Act of 1911 authorized the election in said borough in the year 1913 of six councilmen and not of four only, as held by the Court in its opinion filed; second, because the intent of the Act of 1911 was simply to suspend that part of the Act of 1895, providing for the designation on the ballot of the terms for which two of the candidates were running in the election of 1913, and not to repeal the Act of 1895; and third, because there is no evidence that the electors were misled in voting for the councilmen to be elected in the 1913 election, as they were voted for, without designation of terms.

The first reason is based on an interpretation of the language of the third section of the Act of 1911, which commands the electors to meet on the first Tuesday following the first Monday of November, one thousand nine hundred and thirteen, "to elect as many councilmen as the said boroughs or wards, as the case may be, respectively entitled to, less, however, the number in the respective boroughs or wards elected upon the first Tuesday following the first Monday of November, one thousand nine hundred and eleven." Their argument is that this language may be interpreted so as to mean the number remaining in the respective boroughs or wards who were elected in 1911, instead of the number elected in the respective boroughs or wards in 1911.

As there were three elected in Sugar Notch in 1911, and two had died, there was only one remaining in the borough in 1913 of the three elected in 1911, so that the Act under this construction would authorize the election of six at the 1913 election, because the total number the borough is entitled to is seven, and deducting the one remaining in the borough from the three elected in 1911, would leave six: whereas the Court interpreted the language to mean that the borough was entitled to elect in 1913 the total number of seven, less the number, three elected

in the borough in 1911. The Court did consider this construction of the language of the Act, but concluded from the phraseology and the punctuation that it was a forced construction, and that the intention of the Legislature was to provide for the election of but four councilmen at the 1913 election, and is still of that opinion.

In this view of the meaning of the Act, the second reason given by the respondents for opening judgment and for re-argument would fall, because if the Act of 1911 provided for the election of only four at the election of 1913, then there was no intention to toll or suspend that part of the Act of 1895 providing for the designation on the ballot of the terms of the two to be elected to fill unexpired terms. If the Act of 1911 provided for only four, then the election of the other two must necessarily be provided by some other Act, to-wit, the Act of 1895, which specifically provides for the designation of the terms on the ballot.

In answer to the third reason given, we say that the Act of 1895 was a regulation of the official ballot. This has been held to be within the power of the Legislature so long as it does not deny the franchise itself, either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial *Dewalt v. Bartley*, 146 Pa. 529.

Now, February 9, 1914, the Court having considered the matters contained in the petition of the respondents to open judgments and for a rehearing in the above case, the prayer of the petition is refused.

City of Scranton vs. Erie & Wyoming R. R. Co.

Municipal Assessments—Railroad right of way.

The right of way of a railroad is not assessable for municipal improvements.

C. P. Lackawanna Co., Municipal Lien 86. N. S., 1909.

D. J. Davis, City Solicitor, for plaintiff.

Warren, Knapp, O'Mallery & Hill, for defendant.

Opinion by Edwards, P. J., January 12, 1914:

In each of the above stated cases, a rule was granted to show cause why a municipal lien should not be satisfied. It appears that all the liens are against a certain number of lots owned by the defendant, and that a part of each of said lots, and all of said parts taken together, constitute a part of the right of way of defendant's railroad. Counsel have filed an agreement as to facts, applicable to each case, and the agreement in substance is that the averments in each of the petitions are to be taken as true. It appears that the defendant has paid, in each case, a proportionate part of the assessment, claiming exemption for the balance of the assessment, covering the railroad's right of way. On lien 86, Year 1909, the defendant has paid \$1,190.27; on lien 87, Year 1909, \$244.99; on lien 145, year 1912, \$1,221.35; and on lien 146, year 1912, \$733.98.

The question of law involved in these cases has been decided by us in another case. That the railroad tracks are elevated over a part, or all, of an earth embankment except at street crossings, where the streets are under the tracks, makes no difference in law. The portion of the lots constituting the right of way cannot be assessed for municipal improvements.

The rule in each of the four cases is made absolute.

State-Aid Highways.

The plans and specifications for a state-aid highway cannot be changed after the contract has been let, without re-advertisement.

Opinion by Bell, Attorney General, April 13, 1914, to State Highway Department:

This department is in receipt of your letter of April 1st, inquiring whether your department has a right to agree to a change in the specifications for the improvement of a state-aid road in Scalp Level Borough, upon the application of the borough. The

change desired is that the surfacing be brick paving instead of water-bound macadam.

However desirable it might be, in this particular case, that your department should have the right, at the request of the local authorities most closely affected, to make changes in the specifications for the improvement of roads, you are advised that under the existing legislation there is no such right.

Section 18 of the Highway Act of May 31, 1911 (P. L. 468) provides:

"The kind of materials to be used on any particular highway, or part thereof, to be built, shall be decided or selected by the State Highway Commissioner before the contract is let."

This would be necessarily implied from the provisions of sections 13 and 14 concerning the letting of contracts for highway work.

Section 13 begins:

"All work of construction, building, or re-building of highways, excepting that of repairing and maintenance done under the provisions of this act, shall be by contract, and shall be according to plans and specifications to be prepared in every case by the State Highway Department; and in awarding any contract the work shall be given to the lowest responsible bidder."

Section 14 provides that the advertisements for proposals for work must designate where the plans and specifications may be had.

If, after the contract were advertised and let to the lowest responsible bidder, alterations should be made in the plans and specifications, there would be no certainty that the actual work done would correspond with the work advertised and bid for.

You are therefore advised that if the borough desires your department, and your department is willing, to change the plans and specifications, the contract should be re-advertised.

Bethlehem City Water Co. vs. Borough of Bethlehem.

Boroughs—The Public Service Company Law—Certificate of Public Convenience—Equity.

A municipality extending the pipes of its water plant into territory occupied by another company, without first receiving the approval of the public service commission, will be restrained by injunction.

C. P. Northampton Co., No. 2, June Term, 1914. In Equity.

J. Davis Brodhead, for plaintiff.

George R. Booth, for defendant.

Opinion by Stewart, J., May 18th, 1914:

The following is a summary of the facts.

The plaintiff is a public service company, supplying water to the inhabitants of that part of the defendant borough which was formerly Lehigh County. The defendant is a municipal corporation, owning a water plant, and was about to put its pipes on a street in which the plaintiff company formerly had its pipes, without having obtained a certificate of approval from the public service commission.

DISCUSSION.

We have not found any facts with reference to the two permits from the commissioner of the state board of health. We are unable to see the relevancy of those applications to the present case. The present matter may be summed up in two questions: first, has this court jurisdiction; and secondly, does "The Public Service Company Law," approved July 26, 1913, P. L. 1374, apply to the present facts? The defendant objects that under art. 5, sec. 20 of the constitution of 1874, our chancery jurisdiction is limited to this county; and that the Act of 14th of April, 1905, P. L. 155, Sec. 2, as follows: "That any borough heretofore or hereafter formed by the consolidation of boroughs partly lying or situate in different coun-

ties shall, for all municipal purposes of government and control, be deemed and considered as under and within the jurisdiction of the courts of that county in which is situate the borough first incorporated of those forming such consolidated borough," does not give us jurisdiction because the subject matter of this suit is not one brought for any municipal purpose of government or control. It is not necessary to decide whether this act applies. The authorities of the borough of Bethlehem are within the jurisdiction of this court and the fact that water pipes are being laid in Lehigh County is immaterial. Mr. Justice Mestrezat has referred to the authorities in *Schmaltz v. Manufacturing Co.*, 204 Pa. St., 1, on page 13. That case was followed in *Newman v. Shreve*, 229 Pa. St., 200, and in the latter case Mr. Justice Elkin refers to the opinion in the former case as "interesting and exhaustive." The learned counsel for the borough also relies upon sections 33, 34 and 35 of article 6 of the act, commencing on page 1429, as indicating that we have no jurisdiction. These sections, however, refer only to "Public Service Companies," and in art. 1, sec. 1 of the act, entitled "Definitions," the term "Public Service Company" is defined as including a large number of corporations and the term "Corporation" is then defined, and it is said that it shall not include municipal corporations. Again, by section 29 of article 5, page 1419, it is further provided: "And, except as herein otherwise provided, nothing in this act contained shall in any way abridge or alter the existing rights of action or remedies in equity or under the common or statutory law of the commonwealth, it being the intention that the provisions of this act shall be cumulative, and in addition to such rights of action and remedies." It would seem, therefore, that we have jurisdiction in the present case. Secondly, as to the subject matter; the record in the case of *Bethlehem City Water Co. v. Bethlehem Borough*, 231 Pa. St., 454, was introduced by the defendant in evidence and it was contended that under the authority of that case the Bethlehem City Water Company could extend its mains and pipes without any restriction, through the borough of Bethlehem. All that was decided by that case was that there was no contract

between the water company and the borough of Bethlehem, which had exhausted the power of the borough to supply water to its citizens by its own plant. Since the passage of "The Public Service Company Law" an entirely new situation has been created. The "Public Service Commission" now decides whether a water company, owned by a municipality, can parallel the lines of a private public service company, and can compete with it. The act does not say that such paralleling will not be allowed, but it does say that it will not be allowed until the commission has given its approval by a "Certificate of Public Convenience." It is provided by art. 3, sec. 3, as follows: "Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful—" then follows a, b, and c, referring to public service corporations, and d, as follows: "For any municipal corporation to acquire, construct, or begin to operate, any plant, equipment or other facilities for the rendering or furnishing to the public of any service of the kind or character already being rendered or furnished by any public service company within the municipality. Provided, however, That nothing herein contained shall interfere with or affect the right or power of a municipal corporation to continue the operation of its municipal plant, or to extend the same, within the territory of such municipal corporation, or any part thereof, which is not then being supplied by a public service company rendering or furnishing service of a like kind or character; And provided further, That any municipal corporation which, at the time this act becomes effective, has, by authority of law, in process of construction any such plant for the rendering or furnishing to the public of any such service, may proceed with and complete the said construction, and begin to operate the same, without the aforesaid approval of the commission first had and obtained." When we turn to the title of the act, we find it to be "An Act defining public service companies; and providing for their regulation by prescribing and defining their duties and liabilities; prescribing, defining and limiting their powers, and regulating their incorporation, and, to a limited extent, regulating municipal corporations engaged or about to engage in the busi-

ness of public service companies; creating and establishing a Public Service Commission for the regulation aforesaid;" etc. Then in article 1, "Definitions," we find what the term "Facilities" means, as referring to a public service company. That term is therein defined to refer to pipes, pipe galleries, pipe lines, mains, etc. The definition, however, does not refer to municipal corporations, but there is no necessity to have a statutory definition of the term "Equipment" or "Facilities," when applied to municipal corporations engaged in furnishing water to the public. The pipes, such as are referred to in this act, undoubtedly come within the general definition of the terms. It should be borne in mind that by article 1 no property owned by the municipality, when the act became effective, and by the above quoted section, no plant that was in process of construction, come within the provision of the act. New extensions, however, do apply, and when we turn to art. 5, sec. 18, page 1415, we find it is provided as follows: "or when application shall be made to the commission by any municipal corporation for the approval required by the provisions of article three, section three (d), of this act,—such approval in each and every case, or kind of application, shall be given only if and when the said commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience, or safety of the public," plainly showing that the borough defendant should make the application in the present case. If the application is made and granted, this injunction will have to be dissolved. Another consideration is that without this consent the contractors, who are innocent parties, would be unable to recover against the municipality. Under the terms of the act an extension of this kind is illegal, and any contract entered into by the municipality to carry out an illegal contract, would be one under which the contractor could not recover. The next sections, 19 and 20, show the method of procedure and show plainly that these hearings apply to municipal corporations engaged in furnishing water to the public in the same way as they do to public service companies. We have carefully examined the entire act and other references might be made to sections which

support our view in the matter. The commission itself has rendered an opinion in a contest between two public service companies in the borough of Ashland, filed April 10, 1914. What was there said as to the purpose of the act, applies equally to a contest between a public service company and a municipal corporation, as follows: "It is plain that the approval by the Commission and the giving of its Certificate of Public Convenience involves the determination by the Commission that the carrying into effect of the proposed contract would be for the benefit of the public. Does it appear that the approval of this contract would result in such benefit? The passage of the Act of July 26, 1913, and of similar acts in nearly all of the other states indicates a general judgment that a reliance upon competition between public service companies for securing adequate service and proper rates has not been successful and that hereafter supervision by properly constituted authorities is to be substituted. Long experience has shown that while the temporary effect of competition between public utilities occupying the same territory is to lower rates, the final is likely to be the absorption of one by the other and then an increase of rates to pay the expense of the warfare. The experience of Ashland which once had two or three competitive companies all of them absorbed by the strongest is an illustration. The municipality in the case of companies furnishing light is burdened with the inconvenience and difficulties which arise from the presence of duplicated poles and wires and finally has to pay at least a reasonable return upon the increased capital required by such duplication. The question always is by what means can the public convenience be best served? It may well be that occasions will arise when because of some fundamental defect in the service by the company in the occupancy of the territory due to inadequacy of plant, want of financial strength, or other reason, the public would be benefitted by the introduction of a competing company. Such cases can be determined upon their own merits as they arise."

And now, May 18, 1914, this cause came on to be heard at this term upon motion to continue special injunction, and after

hearing testimony, and upon consideration thereof, it is ordered adjudged and decreed that the injunction, heretofore granted April 29, 1914, be continued until final hearing of said case.

In re Dog: Tax.

Dog Tax—Boroughs—Counties.

The owners of dogs must comply with all the provisions of the Act of June 15, 1911, P. L. 968, in addition to complying with the requirements of borough or city ordinances.

Attorney General's Department. Opinion to Dr. C. J. Marshall, Secretary, State Live Stock Sanitary Board.

Wolf, Third Deputy Attorney General, March 18, 1914:

This department is in receipt of your letter of February 25th, 1914, inquiring whether owners of dogs, in cities or boroughs which have ordinances requiring dog owners to pay the city or borough a dog tax, may be required also to pay a county tax, and secure a county tag, as provided by the Act of June 15, 1911, (P. L. 968), and whether constables may destroy dogs running at large and bearing a city or borough, but not a state, tag.

You are advised that dog owners must comply with the provisions of the Act of 1911, entirely irrespective of what additional requirements there may be imposed by any city or borough ordinances.

The Act of 1911 is an act supplementary to the Act of May 25, 1893 (P. L. 136), which earlier act is entitled: "An act for the taxation of dogs and the protection of sheep."

The paramount power of the state to create, by the taxation of dogs, a fund for the compensation of owners of sheep injured by dogs, and in aid of such an act to require dogs whose owners have paid the tax to bear a tag, cannot be restricted by local regulations.

The fact that owners may have to pay two taxes and that

dogs may have to bear two tags, a county tag and a local tag, does not militate in any way against the efficiency of the state act.

A similar situation arose when the automobile act of April 19, 1908 (P. L. 217), was passed, requiring automobile owners to procure a license from the state. Prior to that time certain cities, by ordinance, had required automobile owners to obtain city licenses. It was held by the Supreme Court in the case of *Brazier vs. Philadelphia*, 215 Pa. 297 (1908), that the state act and the ordinances could co-exist even though the result of such holding might be that automobiles would have to carry two licenses.

Inasmuch as dog owners who have paid a city or borough dog tax are subject to the requirements of the Act of 1911, upon their failure to obey its provisions, constables have the same right to kill their dogs as to kill dogs upon which no city or borough dog tax has been paid.

A P P E N D I X

**Containing General Information of Interest to
Municipal Officers, Reports, Questions,
Answers and forms.**

APPENDIX.

The only questions and answers published are those of importance and of general interest, although we answer all questions by direct correspondence. In all cases the questions and answers are abridged so as to take up less space in publication. We endeavor to answer all questions within forty-eight hours. In writing, the correspondents should give all the details possible, copy of contracts, ordinances, motions, etc.; it will save further correspondence and will prevent us from going astray on the facts. And in stating the facts correspondents should be particularly careful to state all the facts on the other side (if there is another side), just as if they were corresponding for the other side. We expect correspondents to supply postage, although we have always replied just as thoroughly and promptly when postage has been omitted.

QUESTIONS AND ANSWERS.

1. Q. As to necessity of ordinance in purchasing fire apparatus.

A. There is no hard and fast line to be drawn between ordinances and simple motions of council. The size and condition of the borough and the amount expended, compared with the resources of the borough are main factors. To purchase a fire engine in a large city is a small matter; on the other hand, in a small borough it might take all of the present resources of the borough. Speaking generally of the boroughs of this state, we would say that an outlay of \$2,000 for a fire engine should be authorized by an ordinance. It should have executive approval or be passed over the veto.

2. Q. As to refusal of officers to sign orders for payment of bills.

A. If the officers refuse to sign an order or issue a check in

payment of a legitimate bill, suit may be brought and on recovery of a judgment against the borough mandamus will lie to compel the officers to do their duty. If the bill is one incurred without executive approval and is one that should have had the executive approval, it is best to pass a resolution or ordinance ratifying the purchase or expenditure and pass the same over the veto of the burgess. If there is any doubt about the ultimate payment of the bill, the seller should be informed before he makes delivery. It is always safer to have proper action taken in the beginning than to resort to ratification afterwards.

3. Q. As to exonerations from taxes.

A. While there seems to be some little conflict of authority, we believe that under the constitution and laws of the state where taxes are regularly and lawfully levied and are collectible, council has no right to make exonerations. Council may hear appeals and correct errors, but we do not think they can make exonerations without cause.

4. Q. As to property exempt from taxation,—church parsonage.

A. Church property, schools, libraries, hospitals, charitable institutions, etc., are exempt under the constitution and laws of this state, but a church parsonage does not come under any of these classes, even though it is on the same lot and even though it is physically connected with the church building. If the building is devoted to church services and is also a parsonage, or if the parsonage is devoted to holding church services, that is, if the church and the parsonage are one and the same building, it is exempted.

5. Q. As to pay of auditors.

A. Auditors receive \$2.00 per day for each day necessarily employed. There is no time fixed, but an auditor cannot charge for any day he is absent from the audit.

6. Q. As to discharge of policemen.

A. A policeman who fails to do his duty may be discharged at any time. There should be sufficient grounds and he should be given a chance to be heard. It is advisable to employ by the month rather than at a yearly salary, but no matter how they are employed if they fail to do their duty they may be removed by the council.

7. Q. As to ordaining streets.

A. When a street or alley is ordained it is advisable to give all details possible as to courses, distances, widths, grades, etc., and to authorize them to be placed upon the borough map.

8. A. As to telephone poles not on borough streets.

A. As a license tax is imposed for the purpose of paying inspection, poles which are so near the highway that their falling might cause injury to pedestrians or others using the street may, in our opinion, be taxed as poles in the highways.

9. Q. As to regulations governing the widths of sidewalks and gutters.

A. This must be done by ordinance and we enclose ordinance which may be helpful to you.

10. Q. As to recording ordinances.

A. Ordinances must be recorded in the ordinance book. Pasting in the printed ordinances is not sufficient. The borough may be estopped from taking advantage of its own neglect in not transcribing the ordinance, but nevertheless the ordinance is not a valid one and such should be properly repassed and properly recorded, advertised, etc. If this has been the neglect of your predecessors in office, you will have to make the best of it. These conditions frequently arise from the fact that the secretary is not paid sufficiently to properly attend to this duty, and rather than write out in full a long ordinance or franchise he pastes the printed copy in the ordinance book. This may go along for years, but will eventually arise to haunt some future council.

11. Q. As to constructing a competing municipal water plant.

A. While the municipalities have not been united on these subjects, corporations have had their own way and to undertake to erect your own plant you would have to go before the new Public Service Commission and you will have to take up the matter of appropriating streams with the State Health Department. There are several "jokers" in the new Public Service bill; one to the effect that the municipality cannot compete with a public service company without first going to the Public Service Commission. Moreover, if the municipality

wants to contract with a public service company it has to first get the sanction of the Commission. Who put that section in and for what purpose is a mystery, and it is more mysterious that this particular section should go into effect at once and the rest of the act not until January next.

12. Q. As to water rates.

A. We refer you to the report of the Pennsylvania Water Supply Commission of 1909 and subsequent reports. Write to Dow W. Gwinn, Terre Haute, Ind., for his report made to a convention a few years ago. Municipal Engineering, Indianapolis, Ind., has also published rates and may be able to supply you with back issues.

13. Q. As to who shall act in the absence of the burgess.

A. The president of council may act in the absence of the burgess and enforce the ordinances and exercise the general jurisdiction of burgess.

14. Q. As to the holding of two offices.

A. This is bad in practice and is usually unlawful. The secretary cannot very well act as auditor, for his books may form an important part of the audit.

15. Q. As to sidewalks out of repair.

A. If the sidewalk is out of repair and is a nuisance council may remove the same and put the sidewalk in good condition. This may be done without any notice. Sidewalks must always be kept in good repair. However, if the borough desires to cause a new sidewalk to be laid it must give notice according to law and ordinance before it can lay the sidewalk itself and collect the cost from the abutter.

16. Q. As to cleaning and obstructing gutters.

A. Abutters must construct and keep gutters clean. If this is not done the borough may do the work and collect the cost with penalty or it may arrest the offender under its ordinance, or criminal action may be instituted if the offender persists in maintaining a nuisance. An injunction may also lie.

17. Q. As to the organization of council and the terms of office.

A. Questions on these subjects have been asked by several subscribers. We append a reply that will probably answer several correspondents.

Councils will organize the first Monday of January in accordance with the Act of March 2nd, 1911, 2 M. L. R. 276, as amended by the Act of May 20th, 1913, 4 M. L. R. 242. The Act of June 9th, 1911, 3 M. L. R. 3, says that all legislative departments of the municipal government shall assemble in their respective places of meeting at ten o'clock in the forenoon. This would seem to include borough councils. We advise meeting at that hour if possible, and if a quorum is not present or sufficient time can be spared, then adjourn until the evening or later for continuing or perfecting the organization. The Act of 1913 above mentioned describes the terms of office. One-half your number will expire at the end of two years and the other half at the end of four years. The eight men elected this year will have to cast lots to determine which two shall have a two year term and which six shall have a four year term. The four whose office do not expire this year and the two who will then expire in January, 1916, will constitute the short term officers. The other six will continue on until the first Monday of January, 1918. It does not state how the allotment shall be made, but after it is over it would be well to have all the eight councilmen sign a certificate to the effect that the allotment has been properly made and that the two (mentioning names) chosen are to expire in January, 1916, and the other six in January, 1918. You will notice that the act says that the allotment shall be so as to make the representation in the long term as nearly as possible according to wards.

18. Q. As to assessments where there is non-assessable property.

A. The portion of the expenses of paving in front of non-assessable property is distributed among the other abutters along the improvement and the borough according to the proportions mentioned in the Act. It is the total cost of the improvement that is taken into consideration, not the cost in front of each particular property.

19. Q. As to costs in cases where viewers are appointed.

A. The viewers' costs are paid by the county, but all other costs must be paid by the municipality.

20. Q. As to whether a burgess appointed by the court can succeed himself by election.

A. Under the act of 1893 a burgess cannot succeed himself. The wording of the act and the cases under it leads us to the conclusion that it is intended to cover only cases where the burgess has been elected and that he cannot succeed himself by election. There is no appellate decision on this point, but there is a county court case which supports this conclusion.

We do not state exact decided law, but we state our conclusion from the acts and decisions on the subject and what we believe would be the opinion of the appellate court were the case submitted to it. There is no question about the fact that a burgess cannot succeed himself by election, and being elected once he cannot be reelected for the next term, nor can he resign and so qualify himself for reelection. The weight of authority therefore, in our opinion, is to the effect that your burgess may serve by election beginning January next.

21. Q. As to liens when there is a life estate.

A. In cases where there is a life estate and remaindermen it is best, in our opinion, to file a lien against every party interested. The duty to keep sidewalks in repair, for example, is upon the life tenant, and in a lien for that purpose we would be sure to file it against the life tenant and as a precautionary measure against the remaindermen. On the other hand, in a paving lien we would be sure to file it against the ultimate owners and as a precautionary measure against the life tenant. We think the cases uphold this doctrine. The lien should be against The Heirs ofrather than against The Estate of..... It should be against all the tenants in common, rather than against the legal representatives.

22. Q. As to the rights of a borough to compel abutters to build sidewalks and keep them in repair.

A. This subject has been the source of many inquiries so that we reply at length and hereafter will refer inquirers this to answer.

Council has a legal right to build a sidewalk in front of any property where the same is in a dangerous condition. It has the right to repair a sidewalk at all times and without notice, but the right to build a sidewalk requires notice. That is, when conditions are dangerous the council is supposed to repair them

at once, but if not dangerous then reasonable notice must be given before a new sidewalk is laid. The Act of 1905, P. L. 235 covers the subject and we enclose a case reported in Volume III M. L. R. which recites the above act.

In dealing with a man who is sure to bring on litigation it is well to observe the following: First see that the property is on a public street of the borough, on a street either formally accepted or informally accepted by making repairs, etc., on the street. Then be sure of the lines of the street and the width of sidewalk. If there is no ordained grade the change of grade should not be enough to cause damage, although slight changes to meet existing conditions do not entitle the owner to damages. You should then see in whose name the property actually is and be sure that the notice has been served on the owner, that the notice contains all the information necessary for the owner to do the work, and it is advisable to state in the notice where, when and from whom the owner may get further information as to lines and grades. Leave no excuse for his not doing the work. It is also well to have the party serving the notice, or high constable, if you have one, make affidavit of service with copy of notice attached. If you have done all the acts that the ordinance requires, there is no reason why the Council itself could not do the work through their proper officers. It is not necessary to advertise for bids. The penalty of 20 per cent. is that fixed by the Act of 1851, and while the act of 1905 does not repeal any former act you may not be able to charge more than 10 per cent. However, you might add the 20 per cent. to conform to your ordinance and if the owner is satisfied to pay 10 per cent. accept the same, but if you must sue or file a lien then sue for as large amount as possible, as it will not affect the validity of the claim even though the penalty is excessive. Since your ordinance does not follow the act of 1905 you need not mention the act in your proceedings, but state contrary to the acts of assembly in such cases made and provided. If the borough does the work, keep an accurate itemized account of labor, materials, etc. If the owner is going to make a stubborn fight you may as well file a lien as soon as the work is done through an attorney of your county, it must be done within

six months after the work is completed. The lien is prima facia evidence.

23. Q. As to postmaster holding public office.

A. A postmaster of the presidential appointment class may hold any office where there is no salary attached.

24. Q. At to salary of secretaries.

A. In boroughs between 1000 and 2500 the average salary is \$75 a year; beginning at \$50 for boroughs having about 1000 and running to \$125 a year for boroughs having about 2500. In boroughs having over 2500 inhabitants the average salary runs close to 6 cents per inhabitant. In the very largest boroughs the salary of \$1200 to \$1500 prevails. The larger and more progressive boroughs have long since learned the lesson that it does not pay to save on the salaries of borough officials.

25. Q. As to election officers running for other offices.

A. Election officers cannot run for any office to be voted upon at the election over which they act except that of an election officer. The court of common pleas fills vacancies.

26. Q. As to justice of the peace holding the office of burgess.

A. One of our lower courts has decided he can and no appeal was taken. The theory is that a justice of the peace is not in reality an elective officer, but holds his commission from the Governor of the State.

27. Q. As to the commissions of the collector of borough taxes.

A. The act of June 25th, 1885, P. L. 188, amended June 2nd, 1891, P. L. 175, provides as follows: The collector of taxes shall collect the taxes charged in said duplicates and pay over the same to the respective treasurers or authorities entitled thereto, after deducting his commission for the collection thereof, which is hereby fixed at two per centum on all taxes paid to him on which an abatement of five per centum is allowed, and at five per centum on all taxes afterwards collected: Provided, That where the total amount of taxes charged in the duplicates is less than one thousand dollars, the said collector shall receive three per centum on all taxes paid to him on which an abatement of five per centum is allowed.

28. Q. As to borough Treasurer.

A. A borough treasurer is an appointive officer except in certain old boroughs where special acts of assembly apply.

29. Q. As to health ordinances.

A. The State Health Department sent out a model ordinance under the Act of 1893. We do not have an ordinance under the Act of 1909. We believe that the ordinance should contain the substance of the acts and not be inconsistent with them.

30. Q. As to semi-monthly payment of wages.

A. The act approved April 24th, 1913, does not make any exception in the case of a municipality. The act does not state "municipal corporations" but does state "each person, firm or corporation." The necessity of paying semi-monthly will be avoided by making the terms of payment at the time of the hiring and getting the laborer to agree.

31. Q. As to incurring indebtedness.

A. There seems to be no law which requires an appropriation or a tax levy to be made when debts under the two per cent. limit are incurred. A statement of indebtedness should be filed with the clerk of the courts when any debt of considerable amount is incurred, particularly if the borough is near the limit. It serves as notice to contractors and others.

32. Q. As to docket of a burgess.

A. We do not publish a docket, but you may use a docket similar to that of a justice of the peace. We expect in the near future to get out sets of forms for burgesses to use, as we have a large number of inquiries on the subject and there seems to be no publishing house supplying the needs.

33. Q. As to borough controller.

A. It will first be necessary for the town council to pass an ordinance accepting the provisions of the Act of Assembly, No. 329, approved July 12th, 1913. It is now too late to put this act into effect this year.

34. Q. As to the appointment of a health board.

A. The new health board law contemplates that an entirely new board should be appointed within three months after the passage of the act. This does not mean that the personnel of the board should be changed. The old members may succeed themselves, but in order to do so they must again be appointed

under the provisions of this act. The act seems to be lame in that it does not impose any penalty for not appointing a health board under this act. Just how the act will work in practice is hard to determine, but probably we will see before long when cases arise. The direct answer to your question is that as soon as the new board is appointed the old board ceases. An entire new board shall be appointed and the old board continues until the new board is appointed and qualified.

(The forms submitted are suggestive only. They have been carefully drawn by competent solicitors, but we do not assume responsibility for their sufficiency or legality, etc.)

Form of Paving Ordinance.

No.

An Ordinance

Authorizing and directing the paving, grading and curbing, of the whole of Street, County, Pennsylvania, and the construction of the necessary sewers, inlets and appliances along and under said street to conveniently take care of surface water, and providing for the payment of the costs and expenses thereof, in accordance with the Act of Assembly, approved the 12th day of May A. D., 1911, P. L. 288.

Section 1. Be it enacted and ordained by The of the Borough of, and it is hereby enacted and ordained by the authority of the same, That the whole of Street, in said borough, be paved, graded and curbed, and that there be built the necessary sewers, sewer inlets and appliances along and under the said street to conveniently take care of surface water.

Section 2. That the work be done under the Act of Assembly, approved the 12th day of May A. D., 1911, and that the President of Council and the Secretary of the Borough be authorized to enter into a contract or contracts in the name of the borough for said work with such party or parties and upon such terms as council may determine and agree upon.

Section 3. That the borough engineer be designated as the person in charge of said work and that be selected as such engineer, with full power to act for the borough in all things connected with the said work and the contracts thereunder.

Section 4. That any trees, pipes or other materials interfering with the free and full construction of the said work are hereby declared to be nuisances and may be removed or changed by the party or parties with which the borough contracts, or by direction of the said engineer.

Section 5. That so much of the costs and expenses of said work as shall not be paid from other sources shall be paid by the Borough of and the owners of real estate bounding or abutting on said street in accordance with said Act of Assembly, the one-third thereof to be paid by the Borough, and the same is hereby appropriated therefor out of the funds now or hereafter in the treasury, and the two-thirds thereof to be paid by the owners of real estate bounding or abutting on said street, and the same is hereby assessed and the assessments appropriated therefor.

Section 6. That all ordinances or resolutions or parts thereof inconsistent herewith be and the same are hereby repealed.

Enacted and ordained this....day of A. D. 1913.

.....President of Town Council

Attest:....., Secretary.

Approved this....day of A. D., 1913.

.....Chief Burgess.

Form of Traffic Ordinance.

No.

An Ordinance.

Regulating traffic on the streets, alleys, squares and sidewalks in the Borough ofCounty, Pennsylvania, and providing penalties for violations of this ordinance.

Section 1. Be it enacted and ordained by the Burgess and Town Council of the Borough of and it is hereby enacted and ordained by the authority of the same, That here-

after it shall be unlawful for any person to operate, run, ride or drive any animal or vehicle on or along any street, alley or square in the Borough of County, Pennsylvania, unless such person shall take and continue along the righthand side thereof, determined by the direction in which such person is proceeding, and unless in going wholly or partially around the Centre Square such person shall take and continue along and around the right-hand side thereof, determined as aforesaid.

Section 2. It shall be unlawful for any person, whether principal or agent, to wilfully and unnecessarily obstruct or delay the passage of any person or vehicle, or be a party thereto, on or along any street, alley, square and sidewalks thereof in the said borough, unless express written permission is granted therefor under the provisions of some other borough ordinance. Provided that no vehicle be permitted to remain stationary in any highway after notice by a borough officer or other person designated by the Chief Burgess to remove the same.

Section 3. It shall likewise be unlawful for any person, firm or corporation, or their agents, to place or cause to be placed on any street, alley or square, and the sidewalks thereof in the said borough anything that may obstruct the same or prevent or hinder the free and full use of the same, unless express written permission is granted therefor under the provisions of some other borough ordinance.

Section 4. All vehicles, animals, metarials, and things on the highways and sidewalks of the borough contrary to the ordinance are declared to be nuisances and may be removed by the officers of the borough.

Section 5. Any person or persons, firm or corporation, or their agents or officers, violating any of the provisions of this ordinance shall forfeit and pay a fine of not less than one or more than ten dollars, to be recovered for the use of the said borough as fines of like amount are now by law recoverable, and in default of payment of the said fines shall be committed to the borough lock-up for a period of not less than six or more than forty-eight hours.

Section 6. All ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed.

Enacted and ordained this....day of.....A. D., 1913.

.....President of Town Council

Attest:.....Secretary.

Approved this day of A. D., 1913.

.....Chief Burgess.

Form of Automobile Cut-out Ordinance.

No.....

An Ordinance

Providing for and regulating the use of mufflers or silencers on motor vehicles and preventing the operation of motor-vehicles which allow exhaust gases to escape without passing through a muffler or silencer.

Section 1. Be it enacted and ordained by The
.....Borough of.....and it is hereby enacted and ordained by the authority of the same, That hereafter every motor-vehicle operated by the explosive force of gas or other vapor shall be equipped with a muffler or silencer suitable for the purpose of stifling or deadening noises and sounds and through which all the exhaust gases from the engine shall escape, and such muffler or silencer shall be attached and in use while said motor vehicle is operated on the highways of the Borough of

Section 2. It shall be unlawful for the operator or driver of any motor vehicle to use any cut-out, fitting or other device which will allow the exhaust gases to escape without passing through a suitable muffler or silencer.

Section 3. Any person or persons violating any of the provisions of this ordinance shall upon conviction before the chief burgess be fined therefor the sum of not less than one or more than ten dollars, and in default of the payment thereof be imprisoned in the borough lock-up for not less than six or more than twenty-four hours.

Section 4. All ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed.

Enacted and ordained this day of A. D., 1913.

.....President of Town Council.

Attest:.....Secretary.

Approved this day of A. D., 1913.

.....Chief Burgess.

Petition of Freehold Owners of Lots and Outlots to Extend the Borough Limits.

We, the undersigned, a majority of the freehold owners of lots and outlots of a section of land lying adjacent to the Borough of County, Pennsylvania, hereby petition The Burgess and Town Council of the Borough of to declare, by ordinance the admission of the section adjacent to the said borough in which our said lots and outlots are located, and that the corporate limits of the said borough be extended to include the same, in accordance with the acts of assembly in such cases made and provided. We and each of us further petition, and it is agreed and understood by each and all of the signers hereof, that this petition and the land or lands herein signed for may be taken in connection with any other similar petition or petitions and land or lands signed for, with the same force and effect as if all had signed on one petition.

Name

Location and Description.

NOTE: A resident freeholder is one who has actual possession of land for life or a greater estate. It includes married women, minors, corporations, quasi-corporations, owing real estate, and a resident tenant by the courtesy of lands of his deceased wife. It does not include a widow occupying lands of her deceased husband or the owner of an equitable title to land which may or may not be converted into a legal title, or one who has merely a wasted remainder in real estate not in actual possession, or the husband of the owner of the property.

(In response to a number of questions submitted to us on the matter of forms of informations, docket entries, transcripts, etc., we give below a form for Information and for a Docket Entry. We trust in the near future to be able to get out a set of blank forms for burgesses. Inquiry at the office of a local justice of the peace will give sufficient information to fill out the subject of costs and any terms not understood. The concluding paragraphs in the docket form are used only in cases of certiorari when a copy of the docket is required. The important thing is to give sufficient details as to the time and nature of the violation, the title and substance of the ordinance, an abstract of the evidence, and the rendition of judgment.)

Form of Information.

COUNTY OF..... }
BOROUGH OF..... } SS:

The information and complaint of A B of....., County, Pennsylvania, made and exhibited before E F Esq., Chief Burgess of said borough, and the said A B being duly sworn according to law, deposes and says that on the day of, A. D. 191..., between and o'clock, .. M., on, said borough, C D violated Section One of Borough Ordinance No. entitled,

"An Ordinance regulating traffic on the streets, alleys, squares and sidewalks in the Borough of, County, Pennsylvania, and providing penalties for violations of this ordinance," approved the day of A. D., 191..., which said section is as follows: "Section 1. Be it enacted and ordained by the Burgess and Town Council of the Borough of, and it is hereby enacted and ordained by the authority of the same, That hereafter it shall be unlawful for any person to operate, run, ride, or drive any animal or vehicle on or along any street, alley or square in the Borough of, County, Pennsylvania, unless such person shall take and continue along the right-hand side thereof, determined by the

direction in which such person is proceeding, and unless in going wholly or partially around the Centre Square such person shall take and continue along and around the right-hand side thereof, determined as aforesaid," by turning the automobile which he was then and there operating to the left at ----- and continuing to the left along that portion of ----- between ----- street and -----, contrary to the ordinance of the said borough in such case made and provided, whereby according to said ordinance he forfeits the sum of not less than one or more than ten dollars.

Wherefore the said A B prays that the said C D be summoned to answer the premises before the said burgess.

Sworn and subscribed before me	}	----- A B -----
this ---- day of -----, A. D., 19..		
----- E F ----- Chief Burgess.		

Form of Docket Entry.

The Borough of -----	}
vs.	

Commonwealth of Pennsylvania.	
County of -----	

(COSTS)

(Here insert the information, together with the signatures as shown on the docket. Then follow up with the following)

}	The Borough of -----
	vs.

}	Warrant (or summons) issued to -----
	(Police officer) -----, 191.., on oath
	of ----- charging ----- with (here
	insert as in warrant), which is contrary to the form of the ordinance aforesaid.

And now, _____, 191____, _____ defendant, arrested (or summoned) and brought to the office of _____, Chief Burgess of the Borough of _____,

Plaintiff charges the defendant of having violated Section _____ of Ordinance No. _____, entitled, "An ordinance (give title.);" approved the ____ day of _____, 19____, which said section is as follows: (quote the section, follow the information)

The defendant, _____, appears with counsel, _____
_____sworn for the plaintiff.

_____sworn for the defendant.

(state after each name the summary of their testimony.)

And now, _____, 191____, defendant being present, judgment is given publically that _____, defendant, is guilty of the charge laid in the complaint and that he pay a fine of \$_____ as prescribed in said ordinance, or be committed to the borough lockup in default of payment for a period of _____hours.

And now, the _____ day of _____, 191____, defendant by leave of court appeals and enters into recognizance in the sum of \$_____ as in the order of court required.

Same day defendant, by _____, tent. in the sum of \$_____ upon condition that defendant will appear in the Court of _____ County.

I, _____, Chief Burgess, of said borough, certify that the above is a true and correct transcript from my docket, and that the recognizance was duly taken and acknowledged before me as aforesaid.

In Witness Whereof, I have hereunto set my hand and seal this _____ day of _____, A. D., 191____.

Chief Burgess.

QUESTIONS AND ANSWERS.

35. Q. Several questions have been asked on the subject of rate to be charged by tax collectors.

A. The Act of 1913, P. L. 285, reported in Volume IV M. L. R. 245, provides as follows: "The collector of taxes shall

collect the taxes charged in said duplicates, and pay over the same to the respective treasurers or authorities entitled thereto, after deducting his commission for the collection thereof. Such commission shall be fixed by the authorities of the respective boroughs or townships, and shall not exceed five per centum of the amount collected. All taxes collected within the ninety days, as provided in this act, shall be paid over, as aforesaid, within fifteen days after the expiration of said ninety days; and all taxes thereafter collected during his term of office shall be paid over, as aforesaid, at regular intervals of one month; and a complete settlement of all taxes collected shall be made by the collector of taxes, with the respective treasurers or authorities entitled thereto, not later than three months after the expiration of his term of office." |

36. Q. Does the president of council have the same right or greater rights than a member of council in voting on or making motions.

A. A president of council has the right to vote on every motion the same as any other member of council. It is not good parliamentary practice for him to make or second any motion. He has no right to break a tie if his vote makes a tie. That is, he cannot create a tie and then break it.

37. Q. Does the burgess have the right to break a tie in the election of a market master where a vacancy arises in the office during the year.

A. The right of a burgess to break a tie is limited by law to the annual organization of council and covers the offices then filled in pursuance of law or borough ordinance. We do not think in the case you state that the burgess has the right to break a tie.

38. Q. As to liability of a borough in a case where a horse is driven over an embankment which has a guard rail and in which the question of sufficiency of the guard rail was raised.

A. Replying to yours of..... we would say that there are two questions arising,—first, was the embankment properly guarded, and, second, was the party guilty of contributory negligence. The latter will depend on whether he was acquainted with the condition, whether he took proper precautions and whether he

did everything that could be reasonably expected of a prudent and careful driver, having due regard to the locality in which he was driving. The kind of horse and the condition of the driver are also important items, and whether any other person had a similar experience. There are so many elements in a case and so many particular circumstances, it would be impossible to advise definitely at this distance. You should make accurate measurements, take photographs, if necessary, and get all your matter together while it is fresh. If the damage is slight it will probably be cheaper to settle; the only trouble in this case is that you will encourage other people to do the same thing under the slightest pretext. The knowledge of the driver is of great weight, as the court will consider him negligent if he was not especially careful when he knew of the dangerous conditions. Of course, if the man drove off the road and sustained the injury it is not the borough's fault. The borough is expected to maintain its roadway in a safe condition, and protect vehicles, etc., from sliding off or going down embankments. It is not supposed to protect the driver from dangers off the road. If the accident occurred by reason of the driver's getting off the roadway proper, and not by reason of any defect in the roadway, he alone was negligent. You will have to examine the conditions closely and critically. There are cases which are hard to reconcile or decide, as the line of negligence is not clearly marked. If the case should go to a jury, the chances are always against the municipality. The case cannot go to the jury if the party is guilty of contributory negligence or if the borough itself was not altogether negligent.

39. Q. As to the right and ability of a borough to build or acquire a municipal water plant.

A. The first thing to determine is whether the existing plant has an exclusive franchise, and, second, if the borough is financially able to pay for the plant. You cannot increase your debt further without a vote of the people. If you cannot agree on the price you will have to pay the company the cost and 10 per cent. a year, less dividends. Turtle Creek Borough (Allegheny County) has recently had some litigation on this subject; also a number of other boroughs.

Among other things, you will have to go before the public service commission and before the state health department, to get a permit to build or transfer or to secure new water rights. If the company has an exclusive franchise you will have to pay a great deal more for it, as you cannot help yourselves in the way of erecting a competing plant. The exclusive franchise does not have to be one given by the state or by the borough. The old water companies did not have to ask the borough to enter it. Moreover, if the borough gave the water company the right "to supply the inhabitants" of the borough with water, this is construed to mean an exclusive franchise. Under the Act of 1851 the borough has the right to supply the inhabitants with water, but our courts have held, beginning with the Meadville case, that this means the borough may either build its own or grant the right to an outsider and if it once grants the right to an outsider it cannot build its own.

The minutes and records of council will have to be thoroughly searched, charters, transfers, mergers, extension beyond limits, and many other things will have to be investigated. Either the borough or the citizens will have to pay a competent attorney a large fee to do all this and it will probably take six months to work it out. We can refer him to some acts, decisions, etc., but the details and applications will have to be worked out by him.

We suppose your borough is in the position of many other boroughs, where recent raise in rates has been made; the company is either going to reap large profits and make of itself a valuable going concern or else it is preparing to sell to the municipality and is making its books look attractive. A very slight slip by any council, by a mere motion of council, may have granted this company an exclusive franchise without the knowledge of the citizens or the council itself. The nearest our Supreme Court has gotten away from this doctrine is in the Bethlehem case, 231 Pa. 454, reported in Vol. III M. L. R., page 41.

40. Q. As to whether the same party may act as borough treasurer, justice of the peace and assessor.

A. A justice of the peace is commissioned by the Governor,

the assessor elected by the people, and the treasurer appointed by the Council, so that none of the offices are incompatible.

41. Q. As to the duty of council to maintain a covered drain for the benefit of a property owner.

A. Council does not have to maintain a covered drain for the benefit of any property owner. If it is on the corner of a street or alley or other public place, council must maintain it in a proper manner. Moreover, all gutters (whether open or covered) are supposed to be maintained and kept in repair by the owner of abutting property.

42. Q. As to certain limitations and provisions in a franchise of a telephone company.

A. We would say that many ordinances of this nature require that poles be straight, be painted to a certain distance and be numbered. You do not require any license fee. Why is that? It should be placed in the ordinance and not left to adjustment later. If left to adjustment in the courts you will hardly get more than ten cents a pole. It should be placed in the ordinance and should not be less than twenty-five cents per pole and might as well be fifty cents per pole, or twenty-five cents a pole and a dollar per mile of wire. Now is the only time to place this tax. It cannot be done later without being subject to deduction. Section 2 might well read that the poles be placed at such points in the street as shall be designated by the chairman of the street committee. There is a difference between this and "subject to the supervision." Under this ordinance you cannot exclude the company from any streets. It might be well to place in the ordinance that poles may be excluded from any street designated by Council, provided access to the street can be had through other streets or alleys.

43. Q. As to the selling of ice cream, soft drinks and candy on Sunday.

A. Ice cream has been construed to be food, but it is very doubtful if soft drinks and candy would be so construed unless partaken with other articles. The information does not necessarily have to be brought before a burgess, but may be by a summary conviction before a justice of the peace under the "Blue Laws." The place, however, wherein these articles are

sold should be conducted so as not to disturb the peace and quietness necessary for the proper observance of the day.

44. Q. As to whether or not boroughs can compel water companies to install meters.

A. We know of no act whereby a borough may require a water company to install meters. There is a suggestion in the new Clark Bill for Third-Class Cities, and the new Public Service Company bill gives the commission the right to examine and approve meters. There should be some borough legislation on the subject. We suggest that you take the matter up with the Public Service Commission, as they may construe their powers to be sufficiently broad to cover this subject and may so make their rules. Complaints of this nature are kept in mind by the commission in case of revision or amendment of the act.

45. Q. As to the oaths of office and forms of affidavit.

A. The party making the information should swear that the facts set forth in the affidavit are correct and true to the best of his knowledge, information and belief. The witnesses' oath may be as follows; "I do solemnly swear that the testimony I will give in the case now being heard wherein ----- is plaintiff and ----- defendant will be the truth, the whole truth and nothing but the truth, so help me God." Form of affidavit is as follows:

County of ----- }
State of Pennsylvania. } SS:

Before me, the Burgess of the Borough of ----- said county and state personally appeared ----- who having been by me duly sworn according to law did depose and say that they are the duly elected (or appointed) ----- of the Borough of ----- and that they will support the Constitution of the United States and of the Commonwealth of Pennsylvania, and perform the duties of their said offices of ----- of said borough with fidelity.

Subscribed and Sworn to before me }
this ---- day of ----- A. D., 191-- } -----
----- } -----
Chief Burgess. }

46. Q. As to the right of a burgess to discipline police officers.

A. It always was the duty of the burgesses to enforce ordinances, but they never had the power to appoint or dismiss policemen. About three years ago an act was framed to give them this power, but it died in committee and an act almost diametrically opposed to it was passed, June 8th, 1911. It provides as follows:

"Section 1. Such policemen, whether heretofore or hereafter appointed, shall be under the control and direction of the council of the borough in which they shall be appointed, as to the time during which and the place where they shall perform their duties. They shall, when on duty, be subject to the direction of the chief burgess or burgess in the enforcement of the ordinances, and they shall receive such compensation (to be paid from the borough treasury) as may be agreed upon between them and the council, and be subject to removal or discharge at the discretion of the council of such borough."

This act was unsatisfactory and an apparently compromise measure was passed June 19th, 1913, P. L. 538, amending the former act. It provides as follows:

"Such policemen shall, after the passage of this act, be under the control and direction of the chief burgess or burgess of the borough in which they shall be appointed, as to the time during which, the place where, and the manner in which they shall perform their duties; and they shall receive such compensation (to be paid from the borough treasury) as has been heretofore provided, or may hereafter be provided, by ordinance or resolution of the borough council."

The amended act seems to have caused more trouble than the original act, for it apparently gives the burgess more power, but gives him no adequate means of disciplining. In Coatesville the burgess and council got into controversy because he deemed it necessary to appoint two special policemen. At West View, Wilkinsburg, Danville, Bellevue and many other boroughs throughout the state the burgesses are demanding power to discipline police or to be relieved of the responsibility of preserving peace.

Under the present system the burgess has almost no patronage

to dole out, the council having absolute control of appointment and dismissal. An act to give a burgess the right to succeed himself was vetoed by Governor Tener, probably because he believed they might use their patronage to retain office. As the situation stands it would be more appropriate not to permit councilmen to succeed themselves, if the patronage of office is to be considered a criterion. It is altogether likely that the burgesses now in office will make an effort to have the next legislature grant them power of disciplining police officers, or place their control and the responsibility for their conduct on the town council of the borough.

47. Q. From time to time we have had questions pertaining to the right of property owners to obstruct sidewalks with porches, awnings, bay-windows, etc. A. In the case of Commonwealth vs. Masenheimer, President Judge Wanner delivered the following (abridged) charge to the jury, January 6th, 1914:

The defendant, Peter D. Masenheimer, is charged in this case with maintaining a public or common nuisance in the borough of Hanover, by the erection of a porch upon a public highway known as Baltimore street, which obstructed the public use of the pavement in front of his premises. There seems to be no dispute in the case as to the fact that Mr. Masenheimer, the defendant, was the owner of the property, and that he erected the porch complained of. He admits that upon the witness stand. The borough engineer, who is a surveyor by profession, Mr. Adam E. Kohr, testified to the location of Baltimore street, that the width of it was seventy feet, and produced some borough records in connection with his verbal testimony tending to establish the fact that that was the width of the street at the place where the defendant's premises abut upon it.

The Commonwealth contends that the erection of that porch, extending out upon the sidewalk to a distance of between six and seven feet, I believe, constitutes a public nuisance;—and that brings up the necessity of defining and explaining what a public nuisance is. The public streets of cities and boroughs, like the public highways in the open country, are intended for the free and unobstructed use of the traveling public. Every citizen is entitled to the free and unobstructed use of all public highways.

That is the general rule of law, which applies everywhere; and that right to the free, open and public use of the entire highway can only be restricted in certain cases by municipal authority, derived from some statute which, for the benefit of the public, suspends and interferes to a limited degree, with the rights of the individual.

In this case the public of the borough of Hanover had a right to the free and uninterrupted use of the entire width of Baltimore street in the borough of Hanover. No individual private citizen of his own motion, and because it may be to his benefit or convenience to do so, has any right to erect any public building or porch, or construction of any kind, which interferes with and obstructs the use of the highway;—and that means either the use of the street where vehicles pass and repass, or of the sidewalk upon which pedestrians alone pass. Both are to be equally free and open to the public. The erection of a building or obstruction in the street, or on the sidewalk, which prevents the citizens, and the traveling public from elsewhere, from going to and fro on the open street, and on a free and open sidewalk, as at other places, at all times, is a nuisance; and it is a common nuisance, or a public nuisance, because it affects the public rights, and affects the public travel, and the right which every individual living in that neighborhood has to pass and repass on the sidewalks.

Now, the defendant in this case admits that he erected this porch; and, if you find from the evidence that Baltimore street at that time was a public highway, and that the porch projected on the street so that it interfered with the free use of the highway, and he had no authority from any municipal organization with proper power to give it to him to obstruct the sidewalk, then he would be guilty under this bill of indictment.

It is not a question, gentlemen of the jury, of whether he obstructed the sidewalk too much or not. That question can not be left to any individual citizen to decide for himself. One man might choose to take up half the sidewalk; another man might take up three-fourths of it; and you can readily see the disastrous effect that such a power in individuals would have upon the public use of the street and upon the public condition of the highways

and the sidewalks. Therefore the law lays down the rule that an individual citizen has no right to obstruct it at all on his own authority alone. You cannot base your verdict in this case upon any idea of your own, or of anybody else for that matter, as to whether he went out further than he ought to have gone out in building this porch. That is not the question before you. Neither does the fact that there are other porches, or other steps out at other points, already existing along this street, furnish any excuse or any authority for this defendant or any other citizen to erect a structure of his own that will still further impede the public use of the sidewalk. You can not tell, and the Court does not know, under what authority these other steps or these other porches were erected. Other parties may have had legal authority from the municipality, or they may not, you know nothing about that. Therefore you will dismiss from your consideration the fact that others may have porches or obstructions. Your question is whether or not this particular erection of the porch on the sidewalk there was an obstruction, and whether he had a right to erect it.

The testimony of the Commonwealth's witnesses was to the effect that the porch interfered with the use and occupation of the sidewalk at the place covered by it; and the defendant's own witnesses concede also that that portion of the sidewalk now covered by the porch, which was not covered by the steps before, can not be used by the public. It is also conceded by witnesses on both sides that the posts of this porch, and to some extent the banisters, do obstruct the view of parties in passing along the street; and there is evidence that the overhanging roof of the porch covers a part of the sidewalk on which parties might have stood and used it before, and might have had occasion to look upwards before—that it would be an obstruction at that point for that reason.

The defendant has offered in evidence before you as authority for erecting this porch what has been called a permit to erect the porch. That paper will be handed to you, and you may examine it for yourselves. It states that application had been made for a permit to build a porch; and it further goes on to grant to the defendant a permit to use a part of the highway

there on which to store lumber and building materials. That seems to be the literal nature of the permit. That permit was given to the defendant by the chief of police, Mr. John Kiser, according to the testimony. It bears the signature of Mr. John A. Sheely, the chief burgess; but Mr. Sheely says that signature was not placed there by himself. It is not in his handwriting; and he does not recall that he gave authority to any one else to place it there for him. He has no distinct recollection,—no distinct knowledge apparently as to how this particular permit, as it has been called, came to be issued, and delivered to this defendant. And there is no evidence offered in connection with this to show to you that the chief of police had any right to issue permits to any one to erect a porch like this which would obstruct the sidewalk. Nor is there any evidence offered here to show that even the chief burgess himself had the right to grant permits of that kind without the sanction of the council of the borough. There seems to be no authority shown here for the issuing of that permit by the chief of police. If that permit was not issued with proper authority according to law, and by some one legally authorized to grant it, it furnishes no excuse and no permission to the defendant for the erection of this porch, and for maintaining it there on the public highway to the obstruction of its use.

These are the main facts in this case. They are comparatively few. There was no testimony on the subject,—no other testimony that was greatly conflicting as to any material facts in the case. You heard it all; and you will be careful to determine whether this porch did obstruct the sidewalk. That means, did it prevent the people from passing back and forward on the sidewalk where they used to pass before it was erected. And does it obstruct the view of the people on the sidewalk which they used to have before that porch, with its pillars and banisters, was erected? These are questions of fact. If it did so obstruct the sidewalk,—did so obstruct the view,—and was maintained by the defendant wilfully and unlawfully, it was a public nuisance, and such as the indictment states was maintained by the defendant.

And in that connection I repeat what I said before: It is

not a question of how far the defendant obstructed the sidewalk. That is, how far he built out on it. He has no right, according to law, to build one foot, or two feet, or three feet, or four feet, or any distance without proper authority. If it was an obstruction of the free use of the sidewalk by the public, and it was used by him, without authority, you should so find.

I do not know that I can make this any plainer. If you find that the porch was built, and kept up or maintained, in violation of the law, then he is guilty of the offense charged in this indictment, of creating and maintaining a public nuisance, if there is no evidence in the case that shows to you that he had a legal right to do it,—that he had a permit from proper authority, who could give a permit that would be legal, and who did give such a permit, so that he had a lawful right to make this obstruction. If that is so, then of course he ought not to be convicted, and your verdict should be that he is not guilty.

This is called a misdemeanor. You will first determine whether he is guilty or innocent. If you find that he is guilty of building and maintaining a nuisance, you will have nothing to say about costs. If you shall acquit the defendant, then the question of costs arises in the case; and you will have a right to impose the costs either upon the prosecutor, or upon the defendant. Or, you may divide the costs between the two in such proportions as you see fit under the circumstances of the case.

Some little evidence was offered here at the inception of this case tending to indicate that some one else than the named prosecutor was the real prosecutor. The jury have the power to find, where the fact clearly appears to them that some other person than the person named in the bill of indictment is the prosecutor,—they have a right to put the costs on the real prosecutor. But that is a matter which should clearly appear, before the jury exercise the right under the law of imposing the costs upon the real party.

The law gives you the right also to impose the costs of prosecution on the county of York in case of acquittal. But there are comparatively few cases in which the circumstances are so peculiar that the county of York should pay the costs in a case of misdemeanor. But that is entirely for your good judg-

ment. You have the power, and you can dispose of the costs in any of these ways that the Court has indicated.

The photographs of the locality, and the papers that have been offered and admitted in evidence, will be sent out with you. You can examine them in connection with the testimony.

The Commonwealth asks the Court to give binding instructions, which the Court refuses.

48. Q. In response to certain questions asking whether boroughs can do certain things.

A. We reply to this question that boroughs and cities can only do what the legislature expressly empowers them to do, no matter what their local conditions may need or what may be best suited to each particular borough. We desire to here quote from a paper by F. P. Schoonmaker, City Solicitor of Bradford, Pa., read before the 1913 Convention of the League of Cities of the Third Class, held at Erie, Pa.:

"The proper solution of the whole problem is to let each city work out its own problems. Give us home rule for Pennsylvania cities. In other words, pass a law giving power to cities to do everything that they are not restricted from doing by the Constitution or statute law of the State. Take municipal corporations out of the class of agents of the State with limited powers only, and put them in a new class of corporations, as agents for the State for local self-government with power to do all things needful to that end, which are not prohibited to them by constitutional restriction or legislative enactment.

That is the German view of a city corporation. There the people elect a Council and that Council carries on the local government in a way best suited to the needs of the city governed. There is no question of politics in the selection of administrative and executive officers. They hire trained men for those positions and pay them for the talent they exercise, in the same way that our business corporations hire their managers who conduct their private affairs. The result is that German cities have made great advances in the solving of problems growing out of the wonderfully rapid growth of cities at the present time.

I suggest an Act which would provide:

1. That the city be governed by a Council elected by the people.

2. That the Council have authority to constitute such municipal officers as they deem necessary for the management of city affairs.

3. That the Council have power to do whatever in their judgment is necessary for the carrying on of an efficient municipal government, except so far as their power be restricted by law and the State Constitution.

4. Initiative and referendum as to all ordinances except such as are necessary for immediate enforcement for preservation of public health or safety, would have sufficient elasticity to meet the needs of any city, and would produce far more efficient government than an Act specifying precisely the officers to be elected, the powers to be exercised and the limitations to be regarded in the exercise of those powers.

Why is it necessary to limit the power of Councils to make public improvements? It seems as though the Council elected by the people would be sufficiently in touch with the local needs to provide for public improvements where necessary and (that too) in a way that is not a burden. It is fair to assume that the Council will exercise the same degree of honesty as the State Legislature in framing laws for local government, and undoubtedly will be better qualified than the Legislature to provide what is necessary to meet the requirements of their own localities. With the initiative and referendum in force, the local Council certainly cannot keep in force a system of local government that the majority of the people do not approve.

Therefore, I say, repeal the statutes that now hamper the local authorities in providing such a system as their local conditions require, and give us home rule for Pennsylvania cities."

The Public Service Company Law.

In an article in the *Annals of the American Academy of Political and Social Science*, May, 1914, C. Elmer Bown, Attorney at Law, Pittsburg, Pa., opens as follows: "The municipalities of Pennsylvania will be fortunate if they do not pay a heavy toll as a result of the mistaken policy of the public service company law of 1913 in dealing with the question of competition between municipalities and public service corporations."

In this connection we refer to the case of *Bethlehem City Water Company vs. Borough of Bethlehem*, page 289 of this issue and volume. That the public service corporations are taking advantage of the provisions of the act which prevents municipal competition without the Commission's consent is evidenced by cases already presented to and decided by the Commission.

This Borough, after considerable litigation which brought two cases into our Supreme Court (*Bethlehem City Water Co. vs. Bethlehem Borough*, 231 Pa. 454), finally established a municipal plant and was in operation prior to the Public Service Company Act. The effect of the litigation was the breaking away to a great extent from the rule established in 1896 in the *Meadville case*, 177 Pa. 643. The decision stated clearly when municipalities might compete and when they had given away exclusive franchises by contracting with water companies to supply water to the public. In cases of sewerage corporations the court had already declared that the borough might compete, there being no power in the borough to contract for the service under the general borough act of 1851. (*Olyphant Sewerage Company vs. Olyphant Borough*, 211 Pa. 526.)

In *Consolidated Water Company's Petition* (See *The Pennsylvania Corporation Reporter*, Volume I, page 190) the facts were as follows: The petitioner requests the Commission, by the Attorney General, to proceed to restrain the respondent borough from constructing a municipal water plant without obtaining a Certificate of Public Convenience from the Commission. Prior to Jan. 1, 1914, the respondent had employed experts to investigate and report on a possible water supply,

approved at the polls a bond issue of \$50,000.00 for the construction of a plant, secured an option to sink test wells, dug one well, staked out a pump house, and laid a four inch pipe from the test well seventy feet to the site of the pump house. But respondent had not issued its bonds, completed definite plans, let contracts for the work, nor secured a permit from the Commissioner of Health. Respondent contends that such permit, under the Act of April 22, 1905, P. L. 260, is not necessary prior to the construction of the plant, and that the steps taken by it prior to Jan. 1, 1914, were such that it had a plant "by authority of law, in the process of construction" within the meaning of Art. III, Sec. 3, (d) of the Public Service Company Law, P. L. (1913) 1388.

The Commission held, 1. The steps taken by the borough were merely such as were preliminary to the actual construction of its water plant.

2. Without having secured a permit from the Commissioner of Health the borough did not have its water plant "by authority of law in the process of construction."

3. The borough must secure a Certificate of Public Convenience from The Public Service Commission.

In Schuylkill Light, Heat & Power Company's Petition the facts were as follows: "An electric light, heat and power company, which has no plant, but which has associations with a trolley company whose track runs through a borough, applied to the Commission for approval of an ordinance of the borough granting it the right to enter upon the streets, erect poles and wires, and furnish light, heat and power to the borough and its citizens. A light and power company which has occupied the streets of the borough for twenty-nine years, has served the community adequately, and has a plant and facilities which enable it to render adequate and proper service, protests." There the Commission held, "That approval of the contract between the new company and the borough should be withheld. Under such circumstances the public interests of the community will, in all probability, be better served, and expensive, inconvenient and wasteful duplication of facilities avoided, by refusal of the application."

Apparently no distinction is made between the cases where a municipality desires to compete and where the competitor is a private corporation.

We quote further from the article by Mr. Bown: "The act provides that, before any municipal corporation may engage in the rendering or furnishing to the public of any service of the kind and character already rendered or furnished by any public service company in the municipality, the said municipality shall obtain the consent of the commission, except in certain cases where municipalities are already engaged in rendering such services. The commission may not give such consent unless it finds that the exercise of the right by the municipality is necessary and proper for the service, accommodation, convenience or safety of the public.

"The protection from competition thus accorded to the public service companies is an asset of great value and should not have been given to these companies without exacting something in return. To do this is it not necessary to give municipalities the right of unrestricted competition. It is proper to protect public service companies from wanton destruction of their property, but in cases where the commission might refuse its consent to the municipality, the municipality should have been given the right to purchase the property of the private corporation at a valuation to be determined by the commission, which valuation should exclude any added value by reason of the protection from competition afforded by the act. It was proposed to accomplish this result by amending the provision so that municipalities should not be required to obtain the commission's consent except in cases where public service corporations had stipulated that they held their franchises upon indeterminate permits. This amendment was rejected by the legislature, probably because it applied the principle of the indeterminate franchise."

In the light of the decisions and the practice of the commission we believe that it would be far better for the municipalities of Pennsylvania if the Public Service Company Law had never been enacted, and that there should be immediate steps taken to repeal part of it or amend it. At present every corporation

has practically an exclusive franchise; these companies were thus given a most valuable asset not contemplated at the time of incorporation. Municipalities which for years have been preparing for municipal ownership are suddenly prevented from carrying their plans into effect; competition in the necessities of life are eliminated; and corporations which never had an exclusive franchise and never even had municipal consent, corporations which never "banked" on any such rights or powers, are suddenly given them without compensation and without the knowledge or consent of the municipality. All this was done by the simple device of placing a few words in an obscure paragraph in an Act covering sixty-two pages of the Pamphlet Laws.

QUESTIONS AND ANSWERS.

49. Q. As to the necessity of a burgess docket.

A. A burgess should keep a docket in the same manner as a justice of the peace. See forms, Appendix, pages 17, 18 and 19. Every step in the proceeding should be set out in full, together with the ordinance violated.

50. Q. As to shutting off water for non-payment.

A. Water may be shut off for non-payment of water rent due, whether a private corporation or a municipal plant. It has even been held that a company may refuse to supply water to a house where there is rent in arrear for water supplied to a predecessor in title.

51. Q. As to awarding contracts for repairs.

A. Ordinary repairs to the streets do not require an ordinance or advertising for bids. However, if the repairs amount to considerable (in view of the size of the borough) the work should be done by ordinance or at least by the approval of the burgess. If the job is so small that advertising is inadvisable, the work should be let in such a manner as not to give suspicion of fraud or favor.

52. Q. As to the passage of ordinances.

A. Ordinances need not be read more than once unless you have rules requiring several readings. Certain ordinances, for example, the opening of streets, paving of streets without peti-

tion, etc., require special methods of passage and advertising. In all other cases one reading is all that is necessary. The ordinance is not in effect until ten days after it is advertised and posted. Before being advertised it must be approved and transcribed into the ordinance book, therein signed, with certificate of the secretary.

53. Q. As to line fences.

A. The Act of 1905, P. L. 162, prescribes a method for the building of line fences. The borough auditors should be notified in writing and they will investigate the necessity or insufficiency of the fence. They will report to a justice of the peace, and the justice will notify the delinquent owner and give him forty days' notice. If the fence is not erected or repaired the cost thereof may be collected by law. Fences cannot be made by compulsion during the Winter months.

54. Q. As to automobile speed limit.

A. The state statutes permit fifteen miles an hour when signs are posted, twenty-four miles an hour when signs are not posted. The municipality cannot decrease this limit. No limit is given to the operator of an automobile where there is special danger and conditions that require special care; he must limit his speed to the conditions that confront him.

55. Q. As to forms for burgess.

A. We trust to have blank forms printed during this Summer, covering the usual forms needed by the burgesses of the state.

56. Q. As to special meetings.

A. The minutes of a special meeting need not be read at the next special meeting. It is sufficient if the minutes are read at the next stated or regular meeting. It is well, however, to have rules governing this matter and then abide by them.

57. Q. As to dedication of land for street purposes.

A. It is quite customary and comparatively inexpensive to have the owners of the land release the borough from damages for the opening of the street; at the same time if grades are established they may release to the grade as established. An ordinance establishing the street and the grades may then be enacted, or the ordinance may be enacted first and releases obtained to comply with the terms of the ordinance.

58. Q. As to paving done by the borough in connection with the state and county.

A. Property owners may be compelled to lay curb and gutter, and after notice and refusal the borough may do the work. The borough and the property owners may jointly curb and pave the street, with or without petition, and divide the costs either into thirds or assess by jury of view. When paving and curbing is done together the whole work is considered one job; in other words, the borough pays for its share of the curbing. The manner of assessing abutters for paving done by the state and not paid for by the state or county has not been fixed by statute or decision. We see no reason why an assessment should not be laid if the ordinance is properly drawn with that in view and the work done by the state and county treated as a contribution towards the complete paving of the street, somewhat after the manner that street railways contribute a portion of the paving or pay for the same.

59. Q. As to signing and sealing ordinances.

A. All ordinances should be signed in the ordinance book and the seal attached. Every borough should have a seal. If the signatures have been omitted they should be supplied if at all possible.

60. Q. As to second assessment for taxes.

A. Two assessments cannot be made in one year unless there is error, misrepresentation or fraud.

61. Q. As to the drainage from streets.

A. All drainage questions depend upon the natural flow of the water. Water is supposed to continue in its natural course. It may be increased or retarded to some extent, but it cannot be diverted either by the municipality or by the property owners so as to do damage to private property or endanger the traveling public.

62. Q. As to health boards.

A. We advise that you proceed under the Act of 1913 and leave the Act of 1893 out of consideration. If there are any ordinances based upon that act you better re-enact the same if there is any litigation about to arise. The two acts are inconsistent in many respects and the latter act repeals the former.

63. Q. As to contracts with a light company.

A. Before you can enter into a contract with the light company you will have to secure permission of the public service commission. Certain advertising is necessary and this is usually done and paid for by the company desiring the contract. As to prices, we cannot be of any assistance unless we know the number, intensity and make of the lights proposed. You should employ a competent electrical engineer for the purpose.

64. Q. As to salary of secretaries.

A. Our investigations recently made show that in boroughs having a population of between fifteen hundred and two thousand the average salary of the secretary is one hundred dollars a year, and it increases at the rate of about five cents for each inhabitant above two thousand. In the eastern and western coal districts the ratio is higher than in the agricultural counties.

65. Q. As to awarding contracts when there is no money in the treasury.

A. The borough may award contracts up to two per cent. of the assessed valuation. It makes no difference whether the money is actually in the treasury or not; the borough will probably find no difficulty in borrowing. Indebtedness may be incurred up to seven per cent. by vote of the electors.

66. Q. As to water meters.

A. We know of no authority by which boroughs can compel the installation of water meters. Third-class cities were given this power last year and the question will be brought up in the courts very soon in the case of the City of York against the York Water Company.

67. Q. As to the method of increasing indebtedness beyond the two per cent. limit.

A. Papers in this case should be drawn up by a competent local attorney. There are a number of things to be considered, ordinances, notices, ballots, returns, bond ordinances, form of bonds, etc. The validity of these proceedings are examined critically by purchasers of bonds and their sale often depends upon the care in which the proceedings have been conducted. In fact, there are attorneys who make a specialty of examining and approving bonds of this character and no bond-buying

institution will bid until the entire proceedings have been investigated by these experts.

68. Q. As to contents of a sidewalk ordinance and method of compelling the laying of sidewalks.

A. We deem the essentials in the procedure to be: first, a properly opened and ordained street, second, an ordinance requiring sidewalks to be laid, third, a notice to the proper party to lay according to borough regulations and specifying the time, fourth, at the end of the time the work may be done by the borough, keeping an accurate account of time, labor and materials, and fifth, a lien or action in assumpsit to recover the costs with penalty.

Personally, we would only put in the ordinance a general description, state the kinds of material that may be used, width of walk, curb, gutter, depth of curb, and leave the rest to the property owner. It is to his advantage to have the work done well as he must keep it in repair. You could state that the walks, curb and gutter should be laid to conform with the specifications on file in the office of the borough engineer and state that they may be had upon application. General specifications should be sufficient, leaving it to the property owner and his contractor to work out to their own advantage. Your own specifications could govern you in case you lay the walk yourself. If you decide to change the ordinance you should be sure to have your minutes in good shape, and in a case like this you should have your minutes and ordinance book recite exactly the whole situation, properly recorded, signed, approved, certified, published, posted, etc. If the ordinance does not contain the specifications, we do not think it would affect the validity of the proceedings, but you could not hold the owner to the specifications, except such general specifications as are mentioned in the ordinance. Be very careful to get the notice to the proper party. If your engineer has to deviate from the ordinance or anything else, his action should be ratified by the council and approved by the burgess.

If you expect trouble, why not lay a portion where the trouble may arise, yet most advantageous to your position, and test it out before incurring any great expense?

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